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SINGLE APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-58

No. ~~1129~~

OLIVER T. FEIN,

Petitioner,

vs.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 19, 1970
CERTIORARI GRANTED MARCH 8, 1971

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Docket Entries

UNITED STATES DISTRICT COURT
For the Southern District of New York

69 Civil Action File No. 531

OLIVER T. FEIN,

Plaintiff,

—*v.*—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants.

DOCKET ENTRIES

Date	Proceedings
Feb. 7.69	Filed complaint and issued summons.
Feb. 19.69	Filed summons and returns served as follows: Selective Service System Local Board No. 7 by Col. John W. Brokaw on Feb. 14, 1969
	Selective Service System Local Board No. 7 by Miss Hollander on Feb. 13.69
Feb. 19.69	Filed Notice of Motion re: Pre. Inj. Ret. 3/11/69.
Mar. 6.69	Filed Plaintiffs notice of motion ret. 3.25.69 for an order granting preliminary injunction.

Docket Entries

Date	Proceedings
Mar. 6.69	Filed Plaintiffs memorandum of law in support of motion for Prelim. Injunction, and Statement under Rule 9(g).
Mar. 10.69	Filed stip that motions for temporary and permanent injunction ret. 3.11.69 in room 506 are adj'd to 3.25.69.
Apr. 14.69	Filed Memorandum of Law of defendants.
Apr. 14.69	Filed Affidavit of Martin Paul Solomon, Asst. U.S. Attorney.
Apr. 30.69	Filed Affidavit of Michael B. Standard in support of plaintiff's motions.
June 11.69	Filed Affidavit of Martin Paul Solomon in response to affidavit of Michael B. Standard.
June 11.69	Filed MEMORANDUM OPINION #35932, Tyler, J. Plaintiff's motions are denied, and the defendants' motion to dismiss the complaint is granted. Tyler, J. (mailed notice)
June 19.69	Filed plaintiff's notice of appeal to U.S.C.A. dtd. 6-19-69
June 20.69	Filed Certified Record on Appeal to the U.S.C.A.

COMPLAINT

UNITED STATES DISTRICT COURT
Southern District of New York

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants.

COMPLAINT

Plaintiff, by Rabinowitz, Boudin & Standard, his attorneys, complaining of defendants, alleges as follows:

1. Plaintiff is a citizen of the United States and the State of New York. He is, and at all times hereafter referred to has been, a registrant of Selective Service System Local Board No. 7, 45 S. Broadway, Yonkers, New York.

2. Upon information and belief, defendant Local Board No. 7 is a duly constituted local board of the United States Selective Service System, created by Act of Congress 62 Stat. 618, as amended, 50 App. U.S.C. 460; defendant Selective Service Appeal Board is a duly constituted appeal board of the United States Selective Service System for the Southern Judicial District of New York, created by Act of Congress, 62 Stat. 618,

as amended, 50 App. U.S.C. 460; defendant Col. John W. Brokaw, A.G.C., is the Deputy State Director, Operations Officer, who at all times hereafter referred to acted in the place and stead of the New York State Selective Service Director. Defendant National Selective Service Appeal Board is the duly constituted delegatee of the President of the United States to determine on claims or questions with respect to inclusion for, or exemption, or deferment from, training and service in the Armed Forces of the United States authorized by Act of Congress, 62 Stat. 618, as amended, 50 App. U.S.C. 460 as implemented by Executive Order 9988.

3. This Court has jurisdiction under 28 U.S. §§1331, 1343, 1361, 1391 and 2201; the matter in controversy exceeds the value of $10,000.00 exclusive of interest and costs and arises under the constitution and laws of the United States, including Stat. , 50 App. U.S.C. 456 (j); 62 Stat. 618, 50 U.S.C. 460, and the First, Fifth and Sixth Amendments of the Constitution of the United States.

4. Plaintiff is a physician, practicing in the field of community and public health, who held a II-S classification during his attendance at Western Reserve University Medical School until his graduation on or about June of 1967.

5. On or about July 19, 1967, plaintiff was classified II-A by his local board by reason of his position as a Rotating Intern in Medicine and Pediatrics, at the Cleveland Metropolitan General Hospital from June 23, 1967 through June 22, 1968. Thereafter, on or about September 17, 1967, plaintiff requested that Local Board No. 7 transmit to him an application form for Conscientious Objector status (SS form 150) indicating that he was conscientiously opposed to war and to the military. On or about September 26, 1967, plaintiff completed and returned the Conscientious Objector application form together with

riders setting forth facts establishing his sincere opposition to participation in war in any form by reason of his religious training and belief, together with a number of reference letters attesting both to the nature of the plaintiff's principle position, to his religious training, and to his sincerity.

6. On November 15, 1967, the plaintiff had an interview with his local board concerning his Conscientious Objector application. The substance of that interview was essentially: (a) a recognition by plaintiff of a Conscientious Objector's obligation to perform alternative service and plaintiff's willingness to perform such; (b) the religious nature of registrant's training and beliefs upon which he based his opposition to participation in war in any form; (c) his sincerity in holding those beliefs. The plaintiff was not permitted by the local board to produce a witness on his behalf who had accompanied him to the interview to attest his sincerity.

7. On the same date, the plaintiff was retained in his II-A classification by his local board and notified that the local board did not feel the registrant should be reclassified as a Conscientious Objector at that time.

8. Thereafter, following I-A classification by the local board on February 14, 1968 plaintiff in timely fashion requested a personal appearance with his local board which was in fact held on May 22, 1968.

9. Following plaintiff's appearance, the local board reopened plaintiff's file and classified him I-O as a Conscientious Objector by a vote of four to zero.

10. Thereafter, on or about June 4, 1968, the defendant Brokaw on behalf of the office of the State Selective Service Director notified the local board and the defendant Appeal Board that he appealed the I-O classification given to plaintiff.

That notification contained no statement of the reasons for the appeal.

11. Upon notification of the State Director's decision to appeal through the local board to plaintiff, the plaintiff on June 10, 1968 wrote to both the local board and the Appeal Board and requested a statement of the State Director's reasons for his appeal. Plaintiff further requested an opportunity to reply or otherwise be heard prior to a consideration and determination of the appeal by his Appeal Board.

This request was followed by a letter from plaintiff's employer, Dean, School of Medicine, Frederick Robbins, M.D., Case Western Reserve University Medical School, dated June 17, 1968 reaffirming his belief in the propriety of the local board's determination of plaintiff's Conscientious Objector status.

12. Notwithstanding the foregoing request, neither the State Director, the local board, nor the Appeal Board at any time prior to its consideration and decision notified plaintiff of the reasons for the appeal by the State Director.

13. On June 20, 1968, the Appeal Board by a vote of four to zero classified the registrant as I-A. That decision and subsequent notification to the plaintiff did not state either the reasons for the appeal or the reasons for the reversal of the Local board's determination that the registrant was to be classified as a conscientious objector (I-O).

14. On or about July 13, 1968, the registrant requested pursuant to 32 CLR 1627.1 that Gen Lewis Hershey, Director, National Selective Service System, appeal to the National Selective Service Appeal Board on his behalf.

15. Thereafter, the office of the National Selective Service Director, upon notice to local board and to the Southern

District Appeal Board, appealed to the National Selective Service Appeal Board (Presidential Appeal No. 16136).

16. Thereafter, on or about November 26, 1968 the National Selective Service Appeal Board by a vote of three to zero sustained the I-A classification found by the Southern District Appeal Board. At no time did the National Selective Service Appeal Board indicate the bases for its action nor did it notify plaintiff of any such reason.

17. On or about July 31, 1968, registrant received a notice to report for induction pursuant to Special Call No. 42 Doctor of Medicine directing plaintiff to submit to induction on September 6, 1968. Thereafter, on August 29, 1968, plaintiff's notice to report for induction was postponed pending review by National Headquarters.

18. Plaintiff has exhausted all administrative remedies available to him.

19. Plaintiff has never failed, neglected or refused to perform any lawful duty required of him under the Military Service and Training Act of 1967 or its provisions or the rules, regulations or directions issued thereto.

20. (A) The statute and regulations pursuant to which defendants and each of them purported to act in appealing from and reversing the local board's finding that plaintiff should be classified as a conscientious objector in Class I-O, more specifically; 50 App. U.S.C. 460 (a)(2), 32 C.F.R. 1626.1, are unlawful and in violation of the Fifth Amendment *due process* clause in that:

(1) They contain no provision requiring notification to a registrant of the reasons for appeal by the State Selective Service Director.

(2) They contain no provision for the statement of bases of decision by appeal board nor any provision for notification to a registrant of the reasons for appeal by the State Selective Service Director.

(B) The actions of the defendants and each of them pursuant to 50 App. U.S.C. 460 (a)(2), 32 C.F.R. 1626.1, and 32 C.F.R. 1627.1 (a, b) are unconstitutional and violate the Fifth Amendment due process clause in that:

(1) No notice was ever given to plaintiff of the reasons, if any, for the decision to appeal the classification by the local board despite requests made therefor by plaintiff.

(2) No opportunity to submit additional information was given to plaintiff prior to forwarding the appeal to the Appeal Board.

(3) No opportunity was given to plaintiff to present rebuttal to the State Director's appeal from I-O classification.

(4) No statement of the bases of the district appeal board nor the National Selective Service Appeal Board decision was ever made, nor was it notified by either appeal board of the reasons for their decision.

21. The induction of plaintiff into the Armed Forces of the United States unless restrained by this Court, will cause plaintiff irreparable injury and damage in violation of his rights for which plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays:

(a) that a permanent injunction issue restraining defendants, their agents, servants and employees, from ordering or otherwise undertaking the induction of plaintiff into the Armed Forces of the United States;

(b) that pending the hearing and determination of plaintiff's request for permanent relief a preliminary injuction issue restraining the defendants and each of them from ordering plaintiff to report for induction into the Armed Forces of the United States;

(c) that the Court adjudge the reclassification of plaintiff by Appeal Board as null and void and of no legal effect to alter plaintiff's prior I-O classification under the Military Selective Service Act of 1967;

(d) that the Court declare that Selective Service Regulations C.F.R. 1626.1, 1627.1 (a, b) on their face or as applied to plaintiff herein violate the United States Constitution;

(e) that the Court order plaintiff restored to his I-O classification;

and for such other and further relief as the Court deems just.

/s/ _____

Michael B. Standard
Rabinowitz, Boudin & Standard
30 E. 42nd Street
New York, New York 10017
OX 7-8640

Attorneys for Plaintiff

February 7, 1969

Notice of Motion of Plaintiff for Preliminary Injunction, Permanent Injunction and Declaratory Judgment

UNITED STATES DISTRICT COURT
Southern District of New York

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; *et al.*,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on the Complaint herein, the affidavit of OLIVER T. FEIN, sworn to the 6th day of February, 1969, and the exhibits annexed thereto, the undersigned will move this court at a Motion Part thereof to be held in Room 506, United States Court House, Foley Square, New York, New York on the 18th of February, 1969 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting plaintiff a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a permanent injunction and for declaratory judgment and for such other and further relief as this court may deem just and proper.

February 10, 1969

/s/Michael B. Standard
RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017
OX 7-8640

Attorneys for Plaintiff

Notice of Motion

To: SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 7, Yonkers, New York

SELECTIVE SERVICE APPEAL BOARD
FOR THE SOUTHERN DISTRICT OF
NEW YORK

COL. JOHN W. BROKAW, Acting Director,
New York Selective Service System

NEW YORK STATE SELECTIVE SERVICE DIRECTOR

NATIONAL SELECTIVE SERVICE APPEAL BOARD

Affidavit of Oliver T. Fein in Support of Motion for Preliminary Injunction, Permanent Injunction and Declaratory Judgment

UNITED STATES DISTRICT COURT
Southern District of New York

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; *et al.*,

---

AFFIDAVIT

OLIVER T. FEIN, being duly sworn, deposes and says:

1. I am a registrant of Selective Service Local Board No. 7, 45 S. Broadway, Yonkers, New York (SS No. 30 7 40 172) and the plaintiff in the above captioned action. I make this affidavit in support of a motion for an order enjoining the defendants from requiring me to report for or submit to induction. The action is predicated, *inter alia*, upon the failure of the State Selective Service Director, and the two appellate review Boards within the Selective Service System, to state the reasons for their reversal of the finding and classification of my Local Board that I was a conscientious objector and entitled to a I-O classification.

2. I am a doctor of medicine, currently engaged as a physician in the field of community and public health. Immediately prior to this employment, I completed an internship program in Medicine and Pediatrics at the Cleveland Metropolitan General Hospital following my graduation from Western Reserve Medical School in June 1967. Local Board No. 7 had

on July 19, 1967, given me a II-A deferred classification for performance of work in the national interest. The duration of that deferment was one year, until June of 1968.

3. In mid-September, 1967, following a profound evaluation of the religious and moral implications of war and the institutions which implement war, particularly in relation to my role as physician and healer, I came to the conclusion that I was opposed to participation in war in any form.

On September 12, 1967, I wrote to my Local Board asserting my convictions and requesting SSS Form #150, a conscientious objector form. (A copy of the letter is annexed hereto as Exhibit A.)

4. Upon receipt of the form 150, I in timely fashion on September 25, 1967 filed an application for conscientious objector status, making reference therein to particular persons who could attest to my sincerity and principled position. In addition, I appended extensive and detailed riders in response to each of the questions on the form. Both the application and the riders are annexed hereto as Exhibit B.

5. In essence, my beliefs, as expressed in the application and held to this day are that:

(a) War in any form violates the fundamental religious and moral precept that man must live in his community always conscious of the individual value of each human being and that, in addition, war curbs and extinguishes rather than expands man's potential for functioning and good.

(b) In the code of human relations all religions find their common ground and the substance of my beliefs stems from the common foundations of all religions. The value of theology in this regard is of particular importance in distinguishing the credal differences between religions.

(c) The sources which shaped my beliefs and have molded my training were my parents, from whom I gained the basic spiritual approach to life, the Lutheran Church, from which I grasped the concepts of equality of man before God and the singular value of each individual human being to God, the civil rights movement, which was my first experience in non-violent principles and tactics in effecting social change; and from the practice of medicine which served in large measure as an extension of the practical training which began in the civil rights movement. In medicine I found a vocational way of expressing my spiritual and moral values and it has presented me with a new training ground for the practice of my beliefs.

(d) Generally, I indicated that there was no circumstance in which I could envisage participation in society's use of force for any reason with the limitation that, while I do not know how I would react if violently attacked myself, it is conceivable that my response might be to disarm an opponent. This individual limitation relates merely to a unique situation which I have never in fact encountered and is not generalizable to nation-states and war.

6. Thereafter in late September, the Assistant Clerk of Local Board No. 7 wrote a series of letters to the references which I had enumerated in my 150 application form. In the period October 3rd through January 4th the referents responded, Each of the references are appended hereto as Exhibit C. Even a cursory reading of them reflects the view that my beliefs are sincere and deeply held and that each of the sources which I chronicled as the basis for my conviction were in fact known to one or more of the referents.

7. Thereafter, in mid-October, I was asked to attend a meeting of the Local Board to assist it in determining my correct classification (Exhibit D)

8. On November 15, I appeared at a meeting before my Local Board. At that meeting, the following points of significance were raised with regard to my conscientious objector status:

(a) The Board was interested in my awareness of the consequences of obtaining I-O status and the requirement that I perform alternative civilian service. I indicated my unequivocal willingness to perform alternative civilian service, particularly in the areas of concentrated poverty in our country. I suggested that I had a deep feeling of obligation to serve my country but that my conscience would not permit me to do so in the military establishment.

(b) The Board inquired as to those aspects of religious training in the Lutheran church which might reflect support for my religious opposition to war in any form. I indicated that, although I at that time knew of no doctrinal Lutheran church statement expressing opposition to war, it was a matter of a general statement of faith.

(c) The Board read to me a list of institutions it felt would be appropriate locations for alternative service. I indicated I would be willing to serve in any of the locations listed, however expressing the fact that I hoped the Board would give me some choice so that a suitable position for my wife, who is also a physician, might be arranged.

(d) Finally, I informed the Board that I had brought a witness with me, as I understood I could, to attest to my

sincerity. This witness, Dr. David Wegman, Senior Assistant Surgeon in the United States Public Health Service, was not permitted to attend the hearing.

Following the interview with the Local Board I prepared a summary of the contents of the meeting which I forwarded to the Board and which appears annexed hereto as Exhibit E.

The Board in its summary of Appearance indicated that:

> "Registrant stated that his religious belief is the way he lives. This was brought on by the way he lived and was brought up. He stated that he does not want to serve in any capacity in the Armed Forces. He feels that by serving as a doctor in any of the branches, he would have to heal the wounded in order to send them back into battle, and perhaps get killed. He stated that he would be happy to do his share by serving his time in any hospital or mental institutions in slum areas and under-privileged children and people. Mr. Bennett, a Board Member, read from the Act the part concerning a C.O.
>
> "The Board then advised the registrant that they would re-open his 2-A classification so that he would have the opportunity of appealing this classification, as they did not feel that he should be classified as a C.O. at this time."

That summary is annexed hereto as Exhibit F.

9. On November 15, 1967 I was notified that I was retained in my II-A deferred classification and would not be given conscientious objector status at that time.

10. On February 14, 1968, the Local Board, apparently by a vote of 5 to 0, classified me as I-A and mailed that notice

of classification (Form 110) to me. Within 30 days from the date of notice, I requested a personal appearance before the Local Board.

11. On May 2, 1968, the Board again requested that I attend a subsequent meeting to assist it in determining my correct classification (Exhibit G) and suggested that I appear at its offices on May 22, 1968 at 8:00 P.M.

12. In anticipation of the personal appearance, and to satisfy myself as to the Lutheran church's position with regard to participation in war, I made inquiry of Pastor Ray L. Miklethun, a Lutheran clergyman of my acquaintance. Pastor Miklethun by letter dated April 16, 1968 (received by the Board on May 22, 1968) indicated to the Board that "while Lutheranism has not held a total pacifistic position on war, it has always recognized and supported men who have held this belief." The letter indicated that within the Lutheran church a fellowship of clergymen and laymen who are conscientious objectors has developed. Finally, the letter indicated that: "Men who have come out of Lutheran training have been taught that there are limits on participation in war for every Christian . . . [and that the following] statement from *The Augsberg Confession*, Article XVI is typical.

> 'Our churches teach that lawful civil ordinances are good works of God and that it is right for Christians to engage in just wars . . . 'But when commands of the civil authority cannot be obeyed without sin, we must obey God rather than man.' "

This letter of Pastor Miklethun was reviewed by the Board at my appearance before it. It is appended hereto as Exhibit H.

13. Pursuant to suggestion of the Local Board and in anticipation of the May 22nd meeting, I filed a statement which

is annexed hereto as Exhibit I. That statement was an attempt to review and clarify the several points referred to in Paragraph 8, *supra*, and which were raised at the meeting of the Board November 15, 1967.

In pertinent part, I indicated that although I was not a Quaker in the traditional sense, I had gone to a Quaker University and had been influenced by the Quaker philosophy and tradition. I indicated my understanding that formal membership in a "peace church" was not a requisite for consideration of status as a conscientious objector.

In addition, I referred to the lack of awareness on the part of the Local Board of any Lutherans who took a conscientious objector position and indicated that I had in the intervening months become familiar with a group called the Lutheran Peace Fellowship, an organization of Lutherans who hold conscientious objector status.

Finally, I indicated that, although I was not presently a formal member of the Lutheran Church, my beliefs, while certainly constituting a personal moral code, were clearly not merely that since my beliefs are ideals which emanate from centuries of religious tradition with which I have grown from childhood to today.

14. At the meeting before the Local Board on May 22, 1968, the Local Board classified me as a conscientious objector and forwarded my I-O notice of classification.

The Board, subsequent to that meeting, in its Summary of Appearance, stated:

> "Registrant read the attached statement in its entirety. When he finished the board asked if he believes in a Supreme Being, he answered yes. The board asked again

> if he would be willing to work in an institution as a Conscientious Objector status [sic]. He replied he would."

Copy of Summary of Appearance is annexed hereto as Exhibit J.

15. On or about May 24, 1968, I received the notice of classification form with the designation I-O reflecting conscientious objector status.

16. Thereafter on June 4, 1968, Col. John W. Brokaw, Operations Officer and Deputy State Director of the New York Selective Service System forwarded two letters, one to the Appeal Board, Southern District of New York (annexed hereto as Exhibit K) and the other to Dr. Samuel Tunick, chairman of Local Board No. 7 (annexed hereto as Exhibit L).

Each letter was to the effect that the office of the State Director wished to appeal the I-O classification given to me on May 22, 1968.

The State Director said that he thought the I-O classification should have been a I-A classification and indicated, without stating any reason whatever, that "It is our opinion that the registrant would not qualify for a I-O classification as a conscientious objector." The letter to the chairman of the Board in addition stated that the Local Board should advise the registrant and any other persons entitled to notification that an appeal was being taken by the State Director.

17. On June 5, 1968, the Executive Secretary of Local Board No. 7 notified me by letter, copy of which is annexed hereto as Exhibit M, that:

> ". . . under the provisions of Selective Service Regulations 1626.1 the State Director is taking an appeal of your present classification of I-O.

> "Your file is now being forwarded to the Southern District Appeal Board, and you will be advised of the out-come of their decision, as soon as your file is returned to this Local Board."

This letter, as all other communications between myself, the Local Board and the two Appeal Boards, contained no suggestion whatever either as to the reasons for taking of an appeal by the State Director or as to the standards to be applied to judge the finding of the Local Board.

18. On June 9, 1968, Mrs. Carol McEldowney, one of the persons who had filed a letter in support of my request for conscientious objector status, wrote to the Southern District Appeal Board expressing her shock and upset to find the State Director was appealing my classification, indicating that she saw no reason for challenging the classification and suggesting that she would appreciate information with regard to the reasons for the appeal (Exhibit N).

19. The next day I wrote to the Southern District Appeal Board (copy of which letter is annexed hereto as Exhibit O) initially stating my surpirse and dismay at the action of the State Director in appealing my classification and suggesting much bewilderment as to the reason for questioning the I-O classification. My confusion was so great that I said to the District Appeal Board "I request a statement indicating the basis for the State Director's appeal. I also request an opportunity to reply to such a statement, before the Southern District Appeal Board makes a decision concerning my classification."

20. The Southern District Appeal Board did not answer either of my requests and no suggestion has ever been made as to the basis of the State Director's appeal nor was an oppor-

tunity given me to reply before the Appeal Board made its decision.

21. On June 17, 1968, Dr. Frederick C. Robbins, Dean of the School of Medicine, Western Reserve University, another of the persons who had written to the Local Board in support of my conscientious objector application, wrote to the Southern District Appeal Board suggesting in the "strongest terms" his view that the action of the Local Board in classifying me as a conscientious objector was consistent with his own view both of the statute and of myself. (Exhibit P)

In addition, Dr. Robbins wrote to the Executive Secretary of Local Board No. 7 suggesting that he was "quite taken aback" by the fact that the State Director had chosen to appeal. (Exhibit Q)

22. On June 20, 1968, the Appeal Board for the Southern District apparently met, although there is no suggestion in my Selective Service file that there was a meeting, formal or informal.

The action of the Appeal Board, reflected in the Individual Appeal Record, merely states that it voted 4 to 0 that I should be classified in Classification I-A (Exhibit R)

23. On June 24, the Rev. Donald C. Armstrong, another of the persons who had written a letter of reference on my behalf to the Local Board, wrote to the Southern District Appeal Board and reiterated the fact that my conscientious objection was well grounded in both the religious and patriotic traditions of our country. The letter indicated in pertinent part that:

> "The State Director of Selective Service's decision to deny Dr. Fein this status thus appears to be questionable on the basis of the knowledge that is available

about Dr. Fein, but even more on the basis of seeming to refuse to recognize an appeal based on highest conscience."

(Exhibit S)

24. On July 13, 1968, I wrote to General Lewis Hershey, the Director of the Selective Service System, summarizing my position with regard to conscientious objector status and describing at some length the events which transpired between myself and the Selective Service System.

I indicated among other things that a number of injustices occurred with regard to my case, including:

"1. The autonomous opinion of the local board has been contradicted by the opinion of the appeal board, in the circumstance in which the opinion of the local board was challenged by the State Director rather than myself.

2. The State Director, to this time, has not stated to me, the basis for his challenging the local board's judgment, with regard to my case.

3. The local board did not give me an opportunity to submit additional information to my file before forwarding it to the appeal board.

4. I was given no opportunity to present rebuttal to the State Director's reasons for challenging my classification of I-O, whatever they may be.

5. I was granted no right to personal appearance before the appeal board.

I indicated that while I understood that the regulations did not make provision to the Presidential Appeal Board as a matter

of right I hoped that General Hershey could take such an appeal on my behalf if he thought that it was in the national interest or necessary to avoid an injustice. (Exhibit T)

25. On July 31, 1968, I received a Notice to Report for Induction on September 6, 1968, pursuant to "Special Call No. 42, Doctor of Medicine", a copy of which is appended hereto as Exhibit U. Thereafter, on August 29, 1968, that order to report for induction was postponed. (Exhibit V)

26. In mid-July, I received a letter from General Hershey which indicated that his office would consider my case.

27. During the months of July and August, 1968 and at approximately the same time that I had been ordered to report for induction, I received a series of communications with regard to a potential appointment as a commissioned officer in the Armed Forces. On August 20, 1968, I wrote to Lt. Col. Holland W. Starkey, Department of the Army, indicating that I would be unable to accept a commission and assigning as the primary reasons for such rejection that I was a conscientious objector and opposed to military service. A copy of that letter is appended hereto as Exhibit X.

28. On September 16, 1968, Col. G. J. Wendel, Special Assistant to the Director, National Selective Service Headquarters, wrote to Local Board No. 7 (Exhibit Y) and to the State Director of Selective Service (Exhibit Z), noticing the appeal to the National Selective Service Appeal Board in the name of the Director..

29. On September 20, 1968, a representative of the office of the State Director wrote to the chairman of Local Board No. 7 indicating that the National Selective Service Headquarters had advised him that an appeal was being taken to the National Selective Service Appeal Board on my behalf and suggested

that, pending determination, my order to report for induction should be cancelled. A copy of that letter is appended hereto as Exhibit AA.

30. On September 23, 1968, pursuant to both regulation and specific request of the State Headquarters, I was advised by my Local Board that the order to report for induction had been cancelled and that the Local Board had been advised that the National Selective Service Director was taking an appeal to the National Appeal Board. (Exhibit BB)

31. On October 1, 1968, I, for the second time, wrote to the New York State Director asking for some statement which would reflect the basis for challenging my I-O classification and appealing to the Southern District Appeal Board. I stated in that letter: "I could not then, nor can I now, imagine on what grounds you questioned my classification of I-O." In the same letter I once again reiterated that "I would like the opportunity to submit any new information to the National Selective Service Board, which might arise in answering a statement of your reasons for raising my classification of I-O to the Southern District Appeal Board." I never received any response to this letter nor in fact to any other communication which I addressed to the Appeal Board other than the notice of their action. (Exhibit CC)

32. On October 28, 1968, I wrote to the New York State Selective Service Director (Exhibit DD) suggesting that there had been no answer to my letter of October 7th and reiterating my request that I be given a statement from the New York State Director concerning the basis of his appeal from the Local Board's classification of I-O. The response from the State Director's office, dated October 31, 1968, acknowledging only my letter of October 28th, merely stated:

"... that it was the opinion of the State Director of Selective Service that you did not qualify for a deferment in Class I-O as a conscientious objector.

"The State Director's decision was based upon the information contained in your selective service file."

That letter was silent with regard to any matter of substance concerning the bona fides of my status. Even a cursory examination of the letter reveals there does not appear to be reference to either my sincerity or the nature of my religious training or beliefs or my opposition to participation in war in any form. Since these are the only criteria which I understand are relevant to a decision concerning conscientious objector classification, I was then and am to this date at a complete loss as to why there was an appeal of the Local Board's decision. (Exhibit EE)

33. On November 26, 1968, by Minutes of Action Upon Appeal to the President, the Presidential Appeal Board in Appeal No. 16,136 recorded an affirmation of my I-A classification by a vote of 3 - O. Exhibit FF). The Minutes contained no reflection of doubt either as to my sincerity or as to my principled position.

Thereafter, on December 6, 1968, the State Director notified my Local Board that the National Selective Service Appeal Board had classified me in Class I-A (Exhibit GG).

34. That has been the last communication of any relevance to my conscientious objector classification which I have received from any office of the Selective Service System.

35. If the relief sought enjoining my induction is not granted, I face immediately and severely possible loss of state

license to practice medicine and if convicted of a crime thereafter I will be unable to be licensed in any other jurisdiction.

/s/OLIVER T. FEIN

Sworn to before me this
6th day of February, 1969.

/s/Jeanette Rosenfeld
Notary Public

EXHIBIT A

[Annexed to above affidavit]

Request for Form 150

918 Lakeview Road, apt. 4
Cleveland 8, Ohio
September 12, 1967

Local Board No. 7
45 South Broadway
Yonkers, New York

Gentlemen:

Moral convictions are empty unless substantiated by moral acts. I wish, therefore, to declare myself a conscientious objector to war and the institution which propagates war, the military. I hereby request that you send me SSS form #150, so that I may explain the basis for my conscientious objection.

Thank you for your cooperation.

Sincerely yours,

/s/ Oliver Fein, M.D.
SS #30-7-40-172

Budget Bureau No. 33-R1[illegible]

SELECTIVE SERVICE SYSTEM 2-A

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

(PHYSICIAN)

Local Board No. 7

DATE QUESTIONNAIRE RETURNED

SEP 20 1967

LOCAL BOARD NO. 7
45 SOUTH BROADWAY
ROOM 111, 1ST FLOOR
YONKERS, N.Y. 10701

(Local Board Stamp)

Room 111, 1st Floor
of Milepkara, September 19, 1967

COMPLETE AND RETURN BEFORE 10 Days

1. Name of Registrant (First)	(Middle)	(Last)	2. Selective Service No.
OLIVER	THOMAS	FEIN	30 7 40 172

3. Mailing address (Number and street, city, county and State, and Zip Code)

918 Lakeview Road #4 Cleveland 8, Ohio

(The above items, except the date received back at local board, are to be filled in by the local board clerk before the questionnaire is mailed.)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form 100).

The items in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided*, that the local board, in its discretion, may for good cause shown by the registrant, grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

A I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

_____
(Signature of registrant)

B I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

Oliver Fein
(Signature of registrant)

Under the provisions of section 6 (j) of the Universal Military Training and Service Act, as amended, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than $10,000, or to both such fine and imprisonment.

Series II.—RELIGIOUS TRAINING AND BELIEF

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

Room 111, 1st Floor
Yonkers, N. Y. 10701

1. Do you believe in a Supreme Being? ☒ Yes ☐ No

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

See extra sheets

SSS Form 150 (Revised 5-10-66). (Previous printings may be used.)

29/30 Fein Affidavit: Exhibit B

4. Explain how, when, and from whom or from what source you received the training and acquired the belief of your claim made in Series I above.

See extra sheets

5. Give the name and present address of the individual upon whom you rely most for religious guidance.

See extra sheets

6. Under what circumstances, if any, do you believe in the use of force?

See extra sheets

7. Describe the actions and behavior in your life which in your opinion most conclusively demonstrate the consistency and depth of your religious convictions.

See extra sheets

8. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

See extra sheets

Series III—GENERAL BACKGROUND

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Attended	
			From—	To—
Yonkers High School	public h.s.	Yonkers, New York	19 55	19 58
Swarthmore College	college	Swarthmore, Pennsyl.	19 58	19 62
Columbia University	university	New York, New York	19 62	19 65
Western Reserve Univ.	medical sch.	Cleveland, Ohio	19 65	19

2. Chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, which you have been engaged, whether for monetary compensation or not, giving the facts indicated below for each position or job held, or type of work in which engaged.

Type of Work	Name of Employer	Address of Employer	Period Worked	
			From—	To—
Intern	Cleveland Metro. Ho.	Brunch Rock, Cleveland, Ohio	19 62	19
			19	19
			19	19
			19	19
			19	19
			19	19

3. Give all addresses and dates of residence where you have formerly lived.

Number City, Town, or Village	State or Foreign Country	Street Address or R. F. D. Route	Dates of Residence	
			From—	To—
Cleveland	Ohio	11114 Berkshire Ave.	19 65	19 66
Cleveland	Ohio	2908 Jay Avenue	19 6[illegible]	19 [illegible]
Cleveland	Ohio	1651 E. 93rd	19 6[illegible]	19 [illegible]
Cleveland	Ohio	10108 Carnation Ave.	19 [illegible]	19 [illegible]
New York	New York	200 Riverside Drive	19 60	19 [illegible]
[illegible]	Pennsylvania	[illegible]	19 [illegible]	19 [illegible]
Yonkers	New York	29 Rockland Avenue	1944	1963

4. Give the name and address of your parents, and indicate whether they are living or not.

[illegible] and Beatrice Fein - both living

[illegible] High Street, Hastings-on-Hudson, New York

5. (a) State the religious denomination or sect of your father Lutheran-Congregational

(b) State the religious denomination or sect of your mother Lutheran-Congregational

Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

NO

2. Are you a member of a religious sect or organization? ☐ Yes ☒ No. If your reply to item 2 is "yes," complete items (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

(b) When, where, and how did you become a member of said sect or organization?

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

See answer to Series II, question 6.

Series V.—REFERENCES

INSTRUCTIONS.—This series must be completed. If more space is needed use extra sheets of paper.

Give the names and other information indicated concerning persons who could supply information as to the sincerity of the professed convictions against participation in war.

Name	Full Address	Occupation or Position	Relationship
Mrs. Alice Aarons	976 Lakeview, Cleve., O.	mother	friend
Mrs. Harold Armstrong	1776 W. 58th St., Cleve.	minister	friend
Mrs. Ida Holubert	2501 Dentzler, Cleve.	doctor	therapist
Carol Mahoney	11116 Grocery, Cleve.	organizer	friend

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—Every registrant claiming to be a conscientious objector shall make this certificate. If the registrant cannot read, the form and his replies thereto shall be read to him by the person who assists him in completing this form. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended).

I, Oliver Thomas Fein, certify that I am the registrant named and described in the foregoing statements in this form; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are (are, are not) in my own handwriting.

Registrant sign here Oliver Fein
(Signature or mark of registrant)

September 25, 1967
(Date)

(Signature of witness to mark of registrant)

(Date)

(Signature of witness to mark of registrant)

(Date)

If another person has assisted the registrant in completing this form, such person shall sign the following statement:

I have assisted the registrant herein named in completing this form because

(Use example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

(Date)

U.S. GOVERNMENT PRINTING OFFICE: 1950—O-930-930

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

Series II: Question 2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

The beliefs, from which spring the basis for my conscientious objection, include:

1. human beings are primarily "good".
2. the expression of this "goodness" can only be realized, if human beings are allowed to fulfill their potential.
3. all human beings are fundamentally equal, in terms of their value as human beings.

These three beliefs are statements of an ideal. This ideal suggests that a quality or being exists in all men, which is inviolable. The existence of this quality among men imposes upon me responsibilities which surpass any single human relationship. These responsibilities include working for a society that allows for the expression of man's goodness and reflects the individual equal value of each human personality. The style of life dictated by my ideals involves non-violent relationships and some framework of social equality.

War violates this essential being in all men and would compel me to abandon my responsibilities. Rather than secure for man the society in which beliefs such as mine can flourish, it fosters irresponsibility for inhuman and cruel acts. War demands a style of life, which is violent and hierarchical. It curbs and extinguishes rather than expands man's potential.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

In today's world, where there is a growing abandonment of any devine or human code, there is a necessity to reaffirm the values underlying my beliefs. In a world, confronted with the possibility of its own self-destruction, human values and justice must be kindled. Otherwise, the world must face the fate of domination by animal instincts, cunning and violence. Thus the quest for my beliefs takes on profound significance in the context of the present world. For my world view anticipates only the destruction of justice and all human relationships, unless men adhere to the value of man.

In what manner, are the preceding ideals, statements of religious belief? Religion can be defined by function. That is the religion sets forth a guideline for human conduct which determines how human beings should relate to each other. In many religions, these functional qualities are derived from a particular cosmology or theology. Though theology is important in distinguishing the credal diferences between religions, it does not lead to widely differing guidelines for human behavior. It is in the codes for human relations that all religions find their common ground. The substance of my beliefs stems from this common foundation of all religions. Thus my beliefs are not merely a personal moral code, but are ideals which emanate from centuries of religious tradition.

Series II: Question 3. Explain how, when, and from whom or from what sources you received the training and acquired the belief which is the basis of your claim made in Series I above:

Four primary sources have shaped my beliefs and molded my training: my parents, my church, the civil rights movement and medicine.

My parents: From my parents, I gained a basic approach to life, which placed spiritual values above material values. Their

emphasis on creativity, singing, painting and poetry, served as a cornerstone to my belief in the "goodness" of mankind. Though my parents do adhere to a particular set of religious principles, they have been sufficiently permissive to embody the operating model of a group of people, the family, established to allow each individual to fulfill his potential. Thus to each of their sons, they imparted both material, and more importantly, spiritual resources, when these were requisite for fulfilling goals, not always of their liking. Although discussions of war and non-violence were not the predominant content of my relationship with my parents, my mother in particular, probably cemented inclinations towards these issues. Recently in communicating with my parents concerning my position as a conscientious objector, my mother wrote, "I guess I have been basically a pacifist all my life, without ever knowing it."

The Church: From the church, I grasped the concept of the equality of man before God, and the singular value of each individual human being to God. These concepts were fundamental to the doctrine and evangelical character of the Lutheran Church. I recall rejoicing in the truth of the parable, in which it was easier for a camel to pass through the eye of a needle, than for a rich man to enter the kindom of heaven. But the church, also conveyed these attitudes in the relationships it permitted me to establish. Thus, I was able to develop respect for a wide variety of peoples, many of whom differred from my parents in social class and culture. A carpenter, a laborer, a mechanic—each I emulated and regarded as an equal. Of course, the church also reinforced values based on non-violence derived from my parents, as in the beatitudes: "Blessed are the peacemakers: for they shall be called the children of God." But the primary contribution of the church to my development, was the inculcation of the ideal of man's unique worth and equality.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

The civil rights movement: It was not until my involvement with the civil rights movement, that the values of my youth began to take shape and find public expression. The non-violent tactics and way of life originating from the southern Negro students, seemed to be based on my ideals. This form of social change won my allegiance and participation. In Chester, Pennsylvania; in Washington, D.C.; and in Cleveland, Ohio, I received my practical training in the application of my ideals to the society.

Medicine: Medicine represented an extension of that practical training started in the civil rights movement. In medicine, I found a vocational way of expressing my values. For medicine represented the epitome of a vocation that placed a value on human life itself. It preferred not to judge the individual on economic status. Life of all people regardless of social standing deserved equal protection. The preservation of man, not his destruction, was a primary concern. Medicine also represented a new training ground for practicing my beliefs. I learned anew, the equality of man, this time when confronted with death. I was taught again, the unique value of each individual life. I became equipped to preserve and maintain life in the most elementary sense.

Thus, with moral foundation laid by my parents and church, and with a practical training in moral expression through the civil rights movement and medicine, the source for the values and beliefs which lead to my conscientious objection is explicit.

Series II: Question 4. Give the name and present address of the individual upon whom you rely most for religious guidance.

There is no single person, on whom I presently rely for the preponderance of my religious guidance. However, many people

have been significant in contributing to my religious training. In a primary way, as I have mentioned before, my parents have important sources of religious guidance. Over the years, many people have joined their ranks. Among these are the Rev. Robert Heffner (now chaplin, Hartwick College, Oneonta, New York), Dr. Joseph Conard, professor of economics, Swarthmore College, Swarthmore, Pennsylvania (deceased), the Rev. Bruce Klunder, of the student Christian Movement, Cleveland, Ohio (deceased).

Series II: Question 5. Under what circumstances, if any, do you believe in the use of force?

Force is a dynamic term. While it connotes power, energy, coercion and restraint, by itself, the term force does not define the character of these processes. The actual means used to coerce or restrain give substance to the word. Thus, there can be moral and ethical force, as well as violent force. The power of moral force stems from the fundamental "goodness" in human beings. This aspect of men is drawn out and reinforced by the application of moral and ethical force. On the other hand, the use of violent force often evokes the reciprocal violent response from those against whom it is applied. Thus, I believe in the power and values of moral and ethical force, while I reject violent force.

This rejection of violence, however, may be modified by circumstances and the individuals involved. If violently attacked, I might respond violently in self defense, although my motivation would be merely to disarm my opponent and not to kill him. Likewise, my response to the violent assault of a loved one, might well lead me to resort to violent defense. But these illustrations are limited to particular circumstances and specific relationships. They do not hold when generalized to nation

states and war. This is true, because war involves wholesale destruction, not disarming, of the enemy, in a situation where individual relationships between combatants are non-existent. Whole groups of people may be killed without choice, often completely innocent and uninvolved. Finally, the potential of nations to destroy entire nations and the world, makes generalization from individual circumstances to nation states impossible.

Series II: Question 6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

My parents were and are concerned Christians. As a child, I participated in church activities, largely because of the sincere involvement of my parents. During my early adolescence, whatever else I rejected of my parents, the church was not among them. In Boy Scouts, rather than attain high rank, I sought the Lutheran Church Scouting award, Patrio et Deo. Subsequently, I stepped out to become active in the youth activities of the church. Throughout high school, I worked to develop the Luther League program of my local church, the county of Westchester and the state of New York. Even after the first year of college, I travelled as a "caravaner" in the South for the Luther League of America. Through all these experiences, I came in contact with new ideas: the problem of segregation and the issues of war and peace. But by the time I turned 18, none of these questions had become clear enough for me to articulate a set of ideals.

It was while attending the Quaker College of Swarthmore, that I began to formulate my values, although initially I tended to act rather than meditate. The trip to the South after freshman year, alerted my mind to the extent that segregation

permeated American society. The injustice that segregation represented thoroughly disgusted me, and I broke with the church that had given me sustinence until that time, because it condoned segregation in its Southern churches. During my second year at Swarthmore, I cast about seeking ways for expressing my newly developed concept of justice. After returning from a summer in Germany, I was incensed with the biased American journalism about Cuba, which contradicted what I had read in England and Germany. In search of the truth about Cuba, I helped organize an independent trip to that country, by a small group of Swarthmore students. In the fall of my third year at Swarthmore, I attended the second meeting of the founders of the Student Non-violent Coordinating Committee (SNCC) in Atlanta, Georgia. There I was exposed to the concept of non-violent force for change. As chairman of SPAC, the Swarthmore Political Action Committee, I helped organize demonstrations against Woolworth in Chester, Pennsylvania. Later, it was my initiative that established bonds between Swarthmore students and the Chester NAACP. These experiences were most formative in developing my ideas about non-violence. After my third year at Swarthmore, I worked with the American Friends' Service Committee project in the slums of San Francisco. This introduction into the ghetto, primarily through youth gangs, began the pathway which I later trod in Cleveland.

When I was graduated from Swarthmore, I went to Columbia University in New York City, to pursue graduate and pre-medical studies. There I was asked to supervise a high school student group concerned with peace, named STOP. Our concern was primarily for a nuclear test ban treaty and the elimination of the bomb shelter hoax. Though I worked on peace issues, my commitment to non-violence had not yet matured.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

Only in Cleveland, after attending the March on Washington, did I make a full commitment to non-violence. I settled in the midst of the Negro ghetto, during my first year of medical school. There, I hoped to learn better the problems that my Negro neighbors faced in American society. Segregation within the Cleveland school system was a manifest problem. Because of inadequate school facilities, Negroes were being bussed from their neighborhoods to Caucasian schools. However, in these Caucasian schools, they were denied equal access to major facilities, such as bathrooms, playgrounds and assemblies, in an apparent attempt to maintain segregation within the schools. When a group of parents decided, after months of petitioning, to "sit-in" at the Board of Education, I was there with them. For the first time, I realized the power of non-violent action, and its consequences. I was arrested that day for obstructing a fire exit, that is, for non-violent expression of a need for change in the Cleveland school system.

When Students for a Democratic Society contacted me about the possibility of establishing a community project in Cleveland, I seized the opportunity to find a style of life, which would fulfill my new non-violent commitment and provide a framework for working out my ideals about justice and equality. Still today, I live cooperatively, sharing my livlihood with others, all of us helping to allow the maximum expression of each other's potential. Cooperative living has been only one aspect of the community organizing program started in Cleveland by SDS. The neighborhood work itself fostered a fierce anger towards injustice and a respect for the equal worth of men. At first, we worked in a poor white community on issues of unemployment housing and welfare. We achieved small gains, such as the instituting of a free school lunch program for welfare children. However, our activities could not be confined

to the white west-side community alone. After one year, the black community was demanding help to develop indigenous groups there. My wife and I responded by returning to the Negro community, where we have lived since.

Through our involvement in community work, we were made painfully aware of the health deficiencies which crippled the poor community. Clinics were too far away; waiting lines were too long and tedious; doctors were never the same. At the end of our first year in medical school, we decided to study the problem of health care in the inner-city. Data abounded which convinced us of the severe health needs of the inner-city. With the supposed availability of facilities, such as university-centered medical clinics, we asked why people didn't use them. Though a complete answer was not established by our study, it did demonstrate that the primary variables inhibiting medical care utilization by the inner-city are dignity factors, such as waiting, and interpersonal factors, such as the lack of continuity of care and communication with the doctor.

My commitment to cooperative living and the poor community stands as a mature expression of my beliefs. From my choice of vocation to my style of life, I have tried to remain responsible to my beliefs. Thus, I have sought to turn non-violent levers for change in my society, where I have seen injustice; and I have sought to provide, where possible, the opportunity for self-fulfillment of those around me.

Series II: Question 7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for you claim made in Series I above? If so, specify where and when.

Written speech: "The need for a nuclear test ban treaty", given before a meeting of high school students, sponsored by STOP in Brooklyn, New York, 1963.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

Closing remarks, not written, to the Student Health Organizations Conference, at Albert Einstein School of Medicine, New York, New York. February, 1967.

Thesis in partial fulfillment of the requirement for the degree of doctor of medicine: "Attitudes toward Medical Care in the inner-city", completed in January, 1967. Presently located in the library of the Western Reserve School of Medicine, Cleveland, Ohio.

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT C

[Annexed to above affidavit]

Letters of Reference

976 Lakeview
Cleveland, Ohio
Sept. 30, 1967

Selective Service
Local Board #7
Yonkers, N.Y.

Dear Sirs:

In reply to your request for information about.

DR. OLIVER T. FEIN

I give the following information which is without bias and, I believe, the honest truth.

Dr. Fein is most sincerely objective to cruelty of any kind. He is known in our neighborhood as a "most gentle" guy.

To expose Dr. Fein to the kind of brutality evident in war would, I believe, change his personality for the worse instead of better. I feel that the gentleness, patience and compassion that is so rarely seen in young people of this generation, would be utterly destroyed.

While we know there is a war and some must fight we must also realize that some are not capable of doing their best under the conditions of war. I feel for services that he is best qualified to do Dr. Fein would better serve mankind here at home than abroad.

Most sincerely yours,

Alice Aarons

Affidavit of Oliver T. Fein in Suport of Motion
(Exhibit C—Continued)

WEST SIDE CITIZENS ACTION ASSOCIATION

1776 West 38th Street
Cleveland, Ohio 44113

October 5, 1967

Local Board No. 7
45 South Broadway
Room 111, 1st Floor
Yonkers, New York 10701

Gentlemen:

I am replying to your inquiry about the sincerity of Dr. Oliver T. Fein's professed convictions against participation in war, as it relates to his status as a conscientious objector.

I have know Dr. Fein for more than three years during his time in medical school and now, as he interns at Metropolitan General Hospital in Cleveland. He is a dedicated humanitarian who is seeking to serve his fellow men through the medical processes of healing and preventive medicine. With this commitment to healing people, I have heard him express many times that war is directly contrary to what he is seeking to do with his life for other men, that war aggravates human problems and misery and is therefore morally wrong.

I have full confidence in the sincerity of Dr. Fein's convictions in these matters.

Hoping that this may be of help to you in your deliberations, I am

Very truly yours,

/s/(Rev.) Donald C. Armstrong

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit C—Continued)

11116 Greenview
Cleveland, Ohio 44108
19 December 1967

Local Board No. 7
45 South Broadway
Room 111 1st Floor
Yonkers, New York 10701

Dear Sir:

May I first apologize for the tardy response to your letter of September 27, 1967, regarding Dr. Oliver T. Fein, SS No. 30-7-40-172. I was away from home several months, and the letter finally reached me very recently, and I hope my response can be of use to you at this late date.

I am very pleased to be able to recommend Dr. Fein for conscientious objector status. I have known Dr. Fein for a number of years, and during that time I have had the pleasure of working rather closely with him, so I can describe his beliefs with some confidence.

Dr. Fein has a tremendous respect for people and for the value of human life, a belief which has encouraged him to enter the field of medicine. And this attitude also, I believe, helps explain his very consistent position against war and his own unwillingness to participate in war, a view he has held for as long as I have know him (over 4 years). I have frequently heard him explain his views about war to others, and I know he has been willing to make public statements about his beliefs. I know also, from contact with him and his associates, many activities he has had (especially while in college), putting into practice his belief that participation in war is wrong.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit C—Continued)

Finally, at times I have lived in the same neighborhood as Dr. Fein, and have had contact with neighbors of his. Some of these neighbors whom he knows well have told me of their great respect for Dr. Fein, both because of his devotion to his work, and because of the strength of his convictions against participation in war.

If I can supply you with any further information, please feel free to inquire. Thank you.

Sincerely,

/s/(Mrs.) Carol McEldowney

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit C—Continued)

CASE WESTERN RESERVE UNIVERSITY
CLEVELAND, OHIO 44106

January 2, 1968

Selective Service System
Local Board No. 7
45 South Broadway
Yonkers, New York

Dear Sirs:

This is in regard to Dr. Oliver Fein (Selective Service #30-7-40-172), who has declared himself to be a conscientious objector. I am well aware of the difficulty that you must have in dealing with such a situation, particularly when the person in question has only a tenuous relationship with any formal group generally recognized as opposing war on religious or moral grounds. Thus, I should imagine that the matter of the sincerity of Dr. Fein would be something about which you would be very concerned. It is to this point that I should like to address myself.

I have known Dr. Fein and his wife throughout their career in medical school and have had many contacts with them. They were both excellent students and are now performing in a superior manner as internes. They are intelligent and capable physicians but they are most notable because of their deep and compassionate concern for people and their adherence to the highest of ideals. They are both modest, humble people who do not intrude their ideas on others. They have chosen to express their idealism through their performance in life rather than in words. For instance, they chose to live in one of the more deprived neighborhoods in Cleveland and worked quietly but tirelessly to improve the lot of the residents of the area. This

they did in spite of the heavy demands of a medical school curriculum, without compromising their performance as students.

It should be clear that I have the highest regard for these young people. One may disagree with the specific ideas that Dr. Fein expresses, but in my opinion, his honesty and sincerity is not be be doubted.

I hope that my comments may be of some assistance to you in considering this matter and that you will find it possible to render a favorable decision in regard to Dr. Fein.

Sincerely yours,

/s/Frederick C. Robbins, M.D.
Dean, School of Medicine

FCR:rab

School of Medicine
2107 Adelbert Road

EXHIBIT E

[Annexed to above affidavit]

Summary of Personal Appearance by Fein

SUMMARY OF LOCAL BOARD NO. 7 MEETING WITH OLIVER FEIN (30-7-40-172) on NOVEMBER 15, 1967

On November 15, 1967, at the local board's request, I attended a meeting in which the following points of significance were raised.

1. The local board asked if I was aware of the consequences of obtaining the Conscientious Objector status, i.e., civilian alternative service. I indicated my willingness to do civilian service, particularly in the areas of concentrated poverty in our country. I indicated that I felt an obligation to serve my country, but that my conscience would not permit me to do so in the military.

2. The local board read section 6(j) of the Selective Service Law several times. Then the local board proceeded to ask on what basis I claimed to be a conscientious objector. I replied, "On the basis of my religious training in the Lutheran Church and the beliefs that I have come to hold emanating from that training in my conscience." Then the board asked, if the Lutheran Church is opposed in its doctrine to war? I replied, "not in any specific way, however in the general statements of the faith it was." The local board proceeded to say that, in general, everyone including itself, is opposed to war, and that the local board had never met a Lutheran before who claimed to be a conscientious objector. Then, the local board noted that I had attended a college with a Quaker tradition, and asked if I was a member of the Society of Friends. I replied, "I am not presently a Quaker."

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit E—Continued)

3. The local board proceeded to read out a list of institutions that they felt would be appropriate locations for alternative service. I indicated that I would be willing to serve in any of the locations listed, however, I hoped that the board would allow me some choice, so that a suitable position for my wife might be arranged, since she also is a physician. The local board then, gave me the book containing all possibilities for alternative service and admonished me to make a list of those places which I thought might be suitable locations for alternative service, so that I could discuss them with my wife and present them to the board. I was then dismissed from their presence.

4. Upon entering and before leaving, I informed the local board that I brought a witness with me, who could testify as to my sincerity. This witness was Dr. David Wegman, a senior assistant surgeon in the United States Public Health Service. On both occassions the board said they did not wish to see my witness and refused to allow him to attend the hearing.

5. Three minutes after dismissing me from the room, the local board announced that they did not feel they could grant me conscientious objector status at that time.

/s/Oliver Fein, M.D.

I have read the above statements concerning the events of the November 15, 1967 hearing before local board #7 of Oliver Fein, and agree that these were the points mentioned to me after the hearing by Oliver Fein.

/s/David Wegman, M.D.



NEW YORK STATE HEADQUARTERS
SELECTIVE SERVICE SYSTEM

Approved by Director
of Selective Service

SUMMARY OF APPEARANCE BEFORE LOCAL BOARD

Name of Registrant: FEIN, Oliver Thomas Date of Appearance: 11/15/67
Selective Service No. 30-7-40-172
Local Board Member or Members present at meeting: Start of Hearing 9:00 P. M.
Dr. Dunick;Mr. Bennett; Mr. Walker; Mr. Minervini End of Hearing
The registrant has an outstanding order to report for induction. ( ) Yes (x) No

I-O

Type of Appearance:

( ) Procedural right under section 1624.[illegible] Selective Service Regulations.
(x) Discretionary interview.
( ) Meeting under section 1660.20(c) of Selective Service Regulations.

Present classification 2-A Desired classification 1-O

Other persons appearing: None

Oath (affirmation) taken by: Mr. Minervini

Action taken by local board:

( ) The registrant's classification was not reopened.
( ) Postponed registrant's induction until
( ) Request permission from State Director to reopen registrant's classification.
( ) Classified registrant in Class .
( ) Type of civilian work appropriate for registrant to perform in lieu of induction into armed forces

Complete the following if applicable. If either of the following is checked, the opinion of the local board should be recorded on the Minutes of Local Board Meeting (SSS Form 112).

(x) It is the local board's opinion that the registrant is not a genuine conscientious objector and that his beliefs are no different now than they were prior to the issuance of his order to report for induction.

( ) It is the opinion of the local board that the registrant's beliefs matured after the issuance of his order to report for induction. (If such is the case, the local board is required to reopen the registrant's classification.)

Appeal Board-Southern Dist.
46 South Broadway
[illegible] 1968
Room 111, 1st Floor
[illegible], N. Y. 10701

N Y FORM 7 (Sheet 1) (Rev. 4.20.67)

Oral information given by registrant or other persons appearing (indicate which) to assist the local board in classification. (If no additional information is submitted, so indicate.)

Registrant stated that his religious belief is the way he lives. This was brought on by the way he lived and was brought up. He stated that does not want to serve in any capacity in the Armed Forces. He feels that by serving as a doctor in any of the branches, he would have to heal the wounded in order to send them back into battle, and perhaps get killed. He stated that he would be happy to do his share by serving his time in any hospital or mental institutions in slum areas and under-priviledged children and people. Mr. Bennett a Board Member, read from the Act the part concerning a C. O.

The Board then advised the registrant that they would reopen his 2-A classification so that he would have the opportunity of appealing this classification, as they did not feel that he should be classified as a C. O. at this time.

(Attach additional sheets if required)

Written information given by registrant or by other person appearing (indicate which) to assist the local board in classification:

Exhibit A

Exhibit B

Exhibit C

Above summary prepared by Evelyn L Foley Clerk
(Name) (Title)

Date: 11/15/67 19___

N Y FORM 7 (Sheet 2) (Rev. 4.20.67)

Local Board-Southern Dist.
45 South Broadway
Room 111, 1st Floor
Yonkers, N. Y. 10701

57/58
Fein Affidavit: Exhibit F

Plaintiff's

NEW YORK STATE HEADQUARTERS
SELECTIVE SERVICE SYSTEM

Approved by Director
of Selective Service

SUMMARY OF APPEARANCE BEFORE LOCAL BOARD

Name of Registrant OLIVER THOMAS FEIN Date of Appearance: 9/27/68

Selective Service No. 30-7-40-172

Local Board Member or Members present at meeting: Start of Hearing 9:30 P. M.

Dr. Tunick; Mr. Casey; Mr. Minervini; Mr. Walker End of Hearing 10:00 P. M.

The registrant has an outstanding order to report for induction ( ) Yes ( ) No

Type of Appearance:

(XX) Procedural right under section 1624.1 of Selective Service Regulations.
( ) Discretionary interview.
( ) Meeting under section 1660.20(c) of Selective Service Regulations.

Present classification 1-A Desired classification 1-O

Other persons appearing: None

Oath (affirmation) taken by: Mr. Paul Casey

Action taken by local board:

( ) The registrant's classification was not reopened.
( ) Postponed registrant's induction until _____
( ) Request permission from State Director to reopen registrant's classification.
(x) Classified registrant in Class 1-O.
( ) Type of civilian work appropriate for registrant to perform in lieu of induction into armed forces _____

Complete the following if applicable. If either of the following is checked, the opinion of the local board should be recorded on the Minutes of Local Board Meeting (SSS Form 112).

( ) It is the local board's opinion that the registrant is not a genuine conscientious objector and that his beliefs are no different now than they were prior to the issuance of his order to report for induction.

( ) It is the opinion of the local board that the registrant's beliefs matured after the issuance of his order to report for induction. (If such is the case, the local board is required to reopen the registrant's classification.)

Appeal Board-Southern Dist.
46 South Broadway
[illegible] 1968
Room 111, 1st Floor
[illegible]hoff's, N. Y. 10701

N Y FORM 7 (Sheet 1) (Rev. 4.20.67)

59/60 Fein Affidavit: Exhibit J

Oral information given by registrant or other persons appearing (indicate which) to assist the local board in classification. (If no additional information is submitted, so indicate.)

Registrant read the attached statement in its entirety. When he finished the bo ard asked if be believed in a Supreme Being, he answered yes. The board asked again if he would be willing to work in an institution as a Conscientious Objector status. He replied he would.

(Attach additional sheets if required)

Written information given by registrant or by other person appearing (indicate which) to assist the local board in classification:

Appeal Board-Southern Dist.
48 South Broadway

Exhibit A STATEMENT TO LOCAL BOARD #7 - DATED MAY 22, 1968

1968

Exhibit B

Room 111, 1st Floor
Nyack, N. Y. 10701

Exhibit C

Above summary prepared by _____
(Name) (Title)

Date: 5/ , 19

N Y FORM 7 (Sheet 2) (Rev. 4.20.67)

61/62
Fein Affidavit: Exhibit J

EXHIBIT K

[Annexed to above Affidavit]

Notification of Appeal by State Director

SELECTIVE SERVICE SYSTEM
NEW YORK STATE HEADQUARTERS
Federal Building, 441 Broadway
Albany 12207

Refer to file:
3-6.4-03

June 4, 1968

Appeal Board, Southern District
of New York
45 South Broadway
Yonkers, New York

Subject: FEIN, Oliver T.
SS No. 30-7-40-172

Gentlemen:

The State Director wishes to appeal the I-O classification given to the registrant by his local board on May 22, 1968, for a I-A classification.

It is our opinion that the registrant would not qualify for a I-O classification as a conscientious objector.

For the State Director

JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

EXHIBIT L

[Annexed to above affidavit]

Notification of Appeal by State Director

SELECTIVE SERVICE SYSTEM
STATE HEADQUARTERS
FEDERAL BUILDING
441 BROADWAY
ALBANY, NEW YORK 12207

June 4, 1968

Dr. Samuel Tunick
Chairman, Local Board No. 7
45 So. Broadway
Yonkers, New York

Subject: FEIN OLIVER T.
SS No: 30-7-40-172

Dear Dr. Tunick:

The State Director, under the provisions of SSR 1626.1, appeals the I-O classification of the subject named.

Enclosed is the Cover Sheet (SSS Form 101) of this registrant in which has been placed Individual Appeal Record (SSS Form 120) completed and signed.

It is requested that you advise, in writing, the registrant and every person entitled to such notification that an appeal is being taken by the State Director in this case placing copies of the letters in the cover sheet.

When the above has been accomplished, please forward the cover sheet to the Southern District Appeal Board furnishing the Headquarters with a copy of your transmittal letter (LO-21).

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit L—Continued)

Kindly acknowledge receipt of the enclosed cover sheet by signing and returning the duplicate of this letter.

For the State Director

/s/JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

Enclosure

Cover sheet received on _____ by _____

7-20-67

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Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT M
[Annexed to above affidavit]

Notification of Appeal by State Director

Local Board No. 7
45 South Broadway
Room 111, 1st Floor
Yonkers, N.Y. 10701

June 5, 1968

RE:SS No: 30-7-40-172

Dr. Oliver T. Fein
Cleveland Metropolitan General Hospital
3395 Scranton Road
Cleveland, Ohio

Dear Sir:

Please be advised that under the provisions of Selective Service Regulations 1626.1 the State Director is taking an appeal of your present classification of I-O

Your file is now being forwarded to the Southern District Appeal Board, and you will be advised of the out-come of their decision, as soon as your file is returned to this Local Board.

By Direction
Local Board #7

Evelyn L. Folley
Executive Secretary

cc: Dr. Frederick C. Robbins
Rev. Ray L. Miklethun
Mrs. Carol McEldowney

EXHIBIT O

[Annexed to above affidavit]

Letter of Mr. Fein

Cleveland Metropolitan General
Hospital
3395 Scanton Road
Cleveland, Ohio
June 10, 1968

Southern District Appeal Board
45 South Broadway
Yonkers, New York

Gentlemen:

I was surprised and dismayed at the action of the State Director of Selective Service, in appealing my classification of I-O, granted me by Local Board #7.

I cannot imagine on what grounds the State Director is questioning my present classification of I-O. Therefore, I request a statement indicating the basis for the State Director's appeal. I also request an opportunity to reply to such a statement, before the Southern District Appeal Board makes a decision concerning my classification.

Many thanks for your anticipated cooperation.

Sincerely yours,

Oliver Fein, M.D.

SS# 30-7-40-172

cc: Local Board #7

67/68
Fein Affidavit: Exhibit R

SELECTIVE SERVICE SYSTEM

INDIVIDUAL APPEAL RECORD

(Local Board Date Stamp)

Name of registrant FEIN (Last) OLIVER (First) THOMAS (Middle)

Selective Service Number 30 | 7 | 40 | 172

Classified by local board in Class I-O until ____, 19____

Date classified May 22, 19 68

Forwarded on appeal taken by State Director of Selective Service

Date forwarded to Appeal Board June 4, 19 68

☐ Request for Transfer of Jurisdiction Filed

Name and address of employer or residence of registrant 3395 Scranton Road

Cleveland, Ohio

JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

ACTION BY APPEAL BOARD

APPEAL BOARD-SOUTHERN DIST.
45 SOUTH BROADWAY
ROOM-111, 1ST. FLOOR
YONKERS, N. Y. 10701

Appeal Board for the State of _____ (Final No. and Judicial District)

_____ (Street and number) _____ (City)

Classified in Class 1-A until ____, 19____, by the following vote:

Yes 4 No 0 JUN 20 (Date of classification by Appeal Board)

Member or Clerk of Appeal Board

INSTRUCTIONS.—The local board will prepare this form in duplicate. The original will be stapled or otherwise securely fastened to the inside of the front cover of the Cover Sheet (SSS Form 101) of each file forwarded to the Appeal Board, and the copy will be retained in the local board files in lieu of the Cover Sheet, attached to the Charge-Out Card (SSS Form 710).

When the appellant requests a transfer of jurisdiction the box indicating such request will be checked, and the name and address of the employer or the residence of the registrant entered in the space provided.

SSS FORM 120 (Revised 11-01-67)
(Previous publication may be obsolete)

EXHIBIT T

[Annexed to above affidavit]

Letter of OLiver Fein to General Hershey

11605 Fairport Avenue
Cleveland, Ohio 44108
July 13, 1968

Gen. Lewis Hershey, Director
Selective Service System
1734 F. Street, N.W.
Washington, D.C. 20434

[Local Board No. 7 stamp]

Dear General Hershey:

I am writing you to explain what I feel are grave injustices that have occurred to me in the process of the Selective Service System's dealing with my position as a Conscientious Objector.

Let me summarize my position. As I stated in my Form 150, "the beliefs, from which spring the basis for my conscientious Objection, include: (1) human beings are primarily "good"; (2) the expression of this "goodness" can only be realized, if human beings are allowed to fulfill their potential; (3) all human beings are fundamentally equal, in terms of their value as human beings." These beliefs led to my conviction that there is a quality or being common to all men, which is inviolable and supreme. This quality among men imposes upon me responsibilities which surpass those that arise out of any human relationship alone. These responsibilities, which emanate from my beliefs, have increasingly directed the activities of my life. Thus, my beliefs have led me to live in the Negro ghetto; have directed me to work with the poor; have guided me into the vocation of medicine; have placed a priority on developing non-violent relationships; and have made me unalterably

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit T—Continued)

opposed to war. I explained that the source of my religious training and belief was initially my parents and the Lutheran Church. But because of that Church's inability to deal firmly with segregation in its Southern membership, I was compelled to reject the organized church. The evolution of my beliefs was subsequently shaped by involvement in the Civil Rights Movement and the study and practice of medicine. These are the rudiments of my position as a Conscientious Objector, which are detailed more completely in my file. It is this position that will conscientiously oblige me to refuse induction into the Armed Services. It should be clear, that I am willing to serve my country, but only in activities consistent with my conscience.

Let me summarize next, the events in my case. In May, 1958, I registered with the Selective Service System. I was not a Conscientious Objector at that time. I was classified 2-S until July, 1967, when at the onset of internship my classification was changed to 2-A. In September, 1967, I submitted my Form 150. In November, 1967, I appeared before my local board, at which time questions concerning my position were raised. However, no change of classification occurred until February, 1968, when the local board classified me I-A. I requested a personal appearance, and was granted the same, in May, 1968. After the personal appearance the local board changed my classification to I-O. On June 5, 1968, I was advised that "the State Director is taking an appeal of your present classification of I-O. Your file is now being forwarded to the Southern District Appeal Board, and you will be advised of the out-come of their decision, as soon as your file is returned to this local board." On June 10, 1968, I wrote directly to the Southern District Appeal Board, with a copy to the local board, requesting "a statement indicating the basis for the State Director's appeal" and "an opportunity to reply to such a statement." I did not hear from

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit T—Continued)

the State Director, the Southern District Appeal Board or the local board, until I received the notice that I had been reclassified I-A by a vote of 4 to O by the Southern District Appeal Board.

I believe, the following injustices have occurred with regard to my case.

1. The autonomous opinion of the local board has been contradicted by the opinion of the appeal board, in the circumstance in which the opinion of the local board was challenged by the State Director rather than myself.
2. The State Director, to this time, has not stated to me, the basis for his challenging the local board's judgment, with regard to my case.
3. The local board did not give me an opportunity to submit additional information to my file before forwarding it to the appeal board.
4. I was given no opportunity to present rebuttal to the State Director's reasons for challenging my classification of I-O, whatever they may be.
5. I was granted no right to personal appearance before the appeal board.

Since the appeal board was unanimous, I have no appeal to the Presidential Appeal Board. However, the National Director of Selective Service may take such an appeal if it is "in the national interest or necessary to avoid an injustice."

Therefore, I am asking you, as National Director of the Selective Service System, to review my file and raise my case to the Presidential Appeal Board. I also request that you instruct the local board #7 to withhold issuance of induction orders

until you have had the opportunity to review my case. I realize that the State Director also has this authority, but it obviously would be useless to ask him to do this.

I believe a grave injustice against me cannot be avoided without your intervention. I anticipate your fullest consideration and cooperation.

Sincerely yours,

Oliver Fein, M.D. SS#30-7-40-172

cc: State Director
Local Board #7

Approval Not Required.

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

PHYSICIAN

"SPECIAL CLASS No. 42 DOCTOR OF MEDICINE"

LOCAL BOARD NO. 7
45 SOUTH BROADWAY
ROOM 111, 1ST FLOOR
YONKERS, N.Y. 10701

(LOCAL BOARD STAMP)

JUL 31 1968

(Date of mailing)

SELECTIVE SERVICE NO.			
30	7	40	172

The President of the United States,

To

Dr. Oliver T. Fein
11605 Fairport Ave.
Cleveland, Ohio 44108

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report

at LOCAL BOARD OFFICE 45 SO. B'WAY, FIRST FLOOR, ROOM 111 YONKERS, N Y
(Place of reporting)

on SEP 6 1968 (Date) at 7:15 A. M. (Hour)

for forwarding to an Armed Forces Induction Station.
AFEES
CLEVELAND, OHIO

Exe. Secretary (Member or clerk of Local Board)

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters. Be sure to take the following with you when reporting to the induction station. The documents will be returned to you. (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified court order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavits establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you.

SSS Form 252 (Revised 4-28-65) (Previous printings may be used until exhausted.) U.S. GOVERNMENT PRINTING OFFICE 1968 O—766-188

73/74
Fein Affidavit: Exhibit U

Approval not required

SELECTIVE SERVICE SYSTEM

POSTPONEMENT OF INDUCTION

LOCAL BOARD NO. 7
45 SOUTH BROADWAY
ROOM 111, 1ST FLOOR
YONKERS, N.Y. 10701
(Local Board Stamp)

August 29, 1968
(Date)

PHYSICIAN

To: OLIVER T. FEIN, Selective Service No. 30 | 7 | 40 | 172
(Name of registrant)

Address: 11605 Fairport Ave.
(Number and street or R. F. D. route)

Cleveland, Ohio 44106
(City, town, or village) (County) (State) (Zip Code)

1. By authority of Section 1632.2(a) Selective Service Regulations your induction into the armed forces heretofore fixed for SEPTEMBER 6, 1968 (Date) in Order to Report for Induction (SSS Form 252) issued by this local board on JULY 31, 1968 (Date) is hereby POSTPONED until pending review by National Headquarters (Date)

You will be advised by this local board as to the date you will present yourself to this board for delivery for induction after termination of this postponement

2. This postponement will terminate if at any time the reasons therefor should cease to exist. If the reasons for this postponement should cease to exist, it is your duty to report that fact immediately to this local board.

3. It is your continuous duty to report for induction at such time and place as may hereafter be fixed by this local board.

Evelyn L. Foley
(Signature of local board)
Executive Secretary

SSS Form 304 (Revised 10-28-66). Supplies of previous printings may be used

75/76
Fein Affidavit: Exhibit V

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT X

[Annexed to above affidavit]

Letter of Oliver Fein Declining Appointment

11605 Fairport Avenue
Cleveland, Ohio 44108
August 20, 1968

Holland W. Starkay, LTC
Departmen of the Army
Fort George Meade
Maryland, 20755

Dear Sir:

This is to advise you that I cannot accept an appointment as a commissioned officer in the Armed Forces. This is so, primarily for two reasons:

(1) I am a conscientious objector, and therefore opposed to military service. My local Selective Service Board has recognized the validity of my claim to I-O status. However, the State Selective Service Appeal Board has reversed the decision of the local board, for reasons unknown to me. Therefore, I have asked Gen. Lewis B. Hershey to review my file and raise my case to the Presidential Appeal Board.

2. Presently my file is being reviewed by the National Headquarters of Selective Service in consideration of my request for raising my case to the Presidential Appeal Board.

Thank you for your kind attention.

Sincerely yours,

Oliver Fein, M.D.
SS#30-7-40-172

cc: Local Board #7

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT Y

[Annexed to above affidavit]

Notice of Appeal to National Appeal Board

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F Street NW.
Washington, D.C. 20435

September 16, 1968

NOTICE OF APPEAL TO THE NATIONAL SELECTIVE SERVICE APPEAL BOARD

To: Local Board No. 7, Yonkers, New York

Registrant: Oliver T. Fein
SS No. 30-7-40-172

An appeal to the National Selective Service Appeal Board from classification of the above-named registrant by the Appeal Board in class I-A is hereby entered in the name of the Director of Selective Service as is provided in Section 1627.1 of the Selective Service Regulations.

For The Director,

/s/G.J. WENDEL
Colonel, OrdC
Special Assistant to the Director

EXHIBIT Z

[Annexed to above affidavit]

Notice of Appeal to National Appeal Board

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F Street NW.
Washington, D.C. 20435

September 16, 1968

State Director of Selective Service
Federal Building
441 Broadway
Albany, New York 12207

Subject: Oliver T. Fein
SS No. 30-7-40-172

Dear Colonel Boughton:

Notice of Appeal to the National Selective Service Appeal Board in the name of the Director of Selective Service has been placed in the cover sheet of the registrant.

Please inform the local board of this action.

The registrant's current address is shown to be 11605 Fairport Avenue, Cleveland, Ohio 44100.

For the Director

G.J. WENDEL
Colonel, OrdC
Special Assistant to the Director

EXHIBIT AA

[Annexed to above affidavit]

Notice of Appeal to National Appeal Board

SELECTIVE SERVICE SYSTEM
NEW YORK STATE HEADQUARTERS
Federal Building, 441 Broadway
Albany 12207

September 20, 1968

Dr. Samuel Tunick
Chairman, Local Board No. 7
45 So. Broadway
Yonkers, New York

Subject: FEIN, Oliver T., M.D.
SS No. 30-7-40-172

Dear Dr. Tunick:

We are enclosing a copy of a letter dated September 16, 1968 addressed to the State Director from National Headquarters advising that the Director of Selective Service is taking an appeal to the National Selective Service Appeal Board in the case of the above named registrant.

Under the provisions of section 1627.8 of Selective Service Regulations, the registrant's order to report for induction should be cancelled.

Kindly advise the registrant of the above actions.

For The State Director

/s/JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

Enclosure
cc: Manpower Section

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT BB

[Annexed to above affidavit]

Notice of Appeal to National Appeal Board

Local Board No. 7
45 South Broadway
Room 111, 1st Floor
Yonkers, N.Y. 10701

September 23, 1968

RE: SS No: 30-7-40-172

Dr. Oliver Fein
11605 Fairport Ave.
Cleveland, Ohio 44108

Dear Dr. Fein:

Please be advised that we have been advised that the Director of Selective Service is taking an appeal to the National Selective Service Appeal Board in your case.

You are further notified that because of this action your order to report for INDUCTION on September 6, 1968 has been CANCELLED.

As soon as your file is returned to this local board we will notify you of the out-come of this review, and appeal.

By Direction
Local Board #7

/s/Evelyn L. Folly
Executive Secretary

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT CC

[Annexed to above affidavit]

Request for Grounds for State Director's Appeal

11605 Fairport Avenue
Cleveland, Ohio 44108
October, 1, 1968

New York State Director
Selective Service System
441 Broadway
Albany, New York 12207

Dear Sir:

I would like to request, for the second time, a statement from you indicating the basis for your action of raising my classification of I-O, granted me by Local Board #7, to the Southern District Appeal Board. I could not then, nor can I now, imagine on what grounds you questioned my classification of I-O.

I am writing you about this matter now, because the Director of Selective Service is presently taking an appeal to the National Selective Service Appeal Board in my case. I would like the opportunity to submit any new information to the National Selective Service Appeal Board, which might arise in answering a statement of your reasons for raising my classification of I-O to the Southern District Appeal Board.

Many thanks for your anticipated cooperation.

Sincerely yours,

Oliver Fein, M.D.
SS #30-7-40-172

cc: Local Board #7
National Selective Service (Presidential) Appeal Board

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT DD

[Annexed to above affidavit]

Request for Grounds for State Director's Appeal

11605 Fairport Avenue
Cleveland, Ohio
October 28, 1968

Col. John W. Brokaw
Deputy State Director
New York State Selective Service
441 Broadway
Albany, New York 12207

Dear Col. Brokaw:

Your letter of October 7, 1968, did not answer my request, as stated in my letter of October 1, 1968. As I wrote in that letter, I am aware that the Director of Selective Service Appeal Board [has appealed my classification.]* It is precisely because of that appeal, that I reiterated my request to obtain a statement from the New York State Director of Selective Service, concerning the basis for his appeal of the local board's classification of I-O.

I ask again at this time, for such a statement from the State Director so that any new information which might be raised by such a statement could be entered into my file before consideration by the National Selective Serviee Appeal Board.

I hope the matter of my request is clear, and look forward to your kind cooperation.

Sincerely yours,
Oliver Fein, M.D.

OF/de
cc: Local Board No. 7
National Selective Service Appeal Board

*bracketed portion intended in original letter.

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT EE

[Annexed to above Affidavit]

Answer to Request for Grounds for State Director's Appeal

October 31, 1968

Oliver Fein, M.D.
11605 Fairport Avenue
Cleveland, Ohio 44108

SS No. 30-7-40-172

Dear Dr. Fein:

We wish to acknowledge your letter of October 28, 1968, and to advise that it was the opinion of the State Director of Selective Service that you did not qualify for a deferment in Class I-O as a conscientious objector.

The State Director's decision was based upon the information contained in you selective service file.

For The State Director

JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

cc: LB #7

EXHIBIT FF
[Annexed to above Affidavit]

Minutes of Presidential Appeal Board

NATIONAL SELECTIVE SERVICE APPEAL BOARD
1724 F STREET NW.
WASHINGTON, D.C. 20435

MINUTES OF ACTION UPON APPEAL TO THE PRESIDENT

Presidential Appeal No. 16,136

Name of Registrant FEIN (M.D.) Oliver T.
(Last) (First) (Middle)

Selective Service Number: 30 7 40 172

Local Board No. 7 City Yonkers State New York

Classified I-A

Vote: Yes 3 No 0

Date November 26,1968

Henry J. Guiazda
Judge Henry J. Guiazda, Chairman

Dr. Kenneth W. Clement, Member

C N Collates
Commissioner Charles N. Collates, Member

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT GG

[Annexed to above Affidavit]

Notice of Presidential Appeal Board Decision

SELECTIVE SERVICE SYSTEM
STATE HEADQUARTERS
FEDERAL BUILDING
441 Broadway
Albany, New York 12207
December 6, 1968

Chairman
Local Board No. 7

Subject: FEIN, OLIVER T. (M.D.)
SS No. : 30-7-40-172

Dear Sir:

Returned is the Cover Sheet (SSS Form 101) of the subject registrant who was classified by the

[xxx] National Selective Service Appeal Board

[ ] District Appeal Board for the State of

in Class I-A
on November 26, 1968
by a vote of 3 - 0

Kindly acknowledge receipt of the enclosed Cover Sheet by signing and returning the duplicate of this letter.

For The State Director

/s/JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

Enclosure

Cover Sheet received on _____ by _____

NOTICE OF MOTION OF PLAINTIFF FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, DECLARATORY JUDGMENT AND SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
Southern District of New York

69 Civ. 531

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; *et al.*,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on the Complaint herein, the affidavit of OLIVER T. FEIN, sworn to the 6th day of February, 1969, and the exhibits annexed thereto, the undersigned will move this court at a Motion Part thereof to be held in Room 506, United States Court House, Foley Square, New York, New York, on the 25th day of March, 1969 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting plaintiff a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a permanent injunction, for declaratory judgment pursuant to 28 U.S.C. 2201 *et seq.*, and for summary judgment pursuant to

Notice of Motion of Plaintiff for Preliminary Injunction, Permanent Injunction, Declaratory Judgment and Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure, and for such and further relief as this court may deem just and proper.

March 6, 1969

/s/MICHAEL STANDARD
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017
OX 7-8640

TO: SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 7, Yonkers, New York

SELECTIVE SERVICE APPEAL BOARD
FOR THE SOUTHERN DISTRICT OF NEW YORK

COL. JOHN W. BROKAW, Acting Director,
New York Selective Service System

NEW YORK SELECTIVE SERVICE DIRECTOR

NATIONAL SELECTIVE SERVICE APPEAL BOARD

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Affidavit of Martin Paul Solomon In Opposition To Plaintiff's Motions, And In Support Of Defendant's Motion To Dismiss The Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MARTIN PAUL SOLOMON being duly sworn deposes and says, upon information and belief:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, attorney for the defendants in this action, and as such am familiar and in charge of this case.

2. This is an action by plaintiff for a preliminary injunction staying the induction of plaintiff into the Armed Forces of the United States and for summary judgment declaring the appellate procedure of the Selective Service System unconstitutional.

3. Registrant was born on May 5, 1940, and first registered with the Selective Service System on May 22, 1958. Registrant was not a conscientious objector at the time of his initial registration. The registrant graduated from Swarthmore College in June of 1962 with a baccalaureate degree in political science. By letter dated June 24, 1962, the registrant notified his local draft board that he was entering graduate school at the University of Pittsburgh, as a graduate student in political science.

By letter dated October 10, 1962, Local Board No. 7 was advised by Columbia University that the registrant planned to

enter medical school in September, 1963, and that Mr. Fein was then officially registered with the pre-medical office of Columbia University.

Registrant entered the school of medicine of Western Reserve University in September of 1963, from which he was graduated in June, 1967.

By notice dated June 27, 1967, Dr. Fein was ordered to report for a physical examination. By letter dated September 12, 1967, Dr. Fein declared himself a conscientious objector and requested Local Board No. 7 to forward to him the appropriate conscientious objector forms.

By reason of his medical internship at Cleveland Metropolitan Hospital, Dr. Fein was classified II-A (internship) on July 19, 1967. On November 15, 1967, the registrant had a personal appearance with Local Board No. 7, to discuss his claim as a conscientious objector. On February 14, 1968 Local Board No. 7 rejected the registrant's request to be classified as a conscientious objector and classified him I-A. Upon receipt of said advice, registrant requested a new appearance and as a result of this new appearance was reclassified by the local board as a conscientious objector (I-O) on May 22, 1968.

4. By letter dated June 4, 1968, the State Director of Selective Service appealed registrant's I-O classification. See Exhibits A and B. Dr. Fein was notified of said appeal. See Exhibit C. On June 20, 1968, the Appeal Board for the Southern District of New York reclassified registrant I-A. See Exhibit D. On September 16, 1968, the Director of Selective Service appealed said I-A classification to the National Selective Service Appeal Board. See Exhibit E. Dr. Fein was advised of said appeal to the National Selective Service Appeal Board. See Exhibit F. In answer to a request by Dr. Fein as to why the State Director appealed the I-O classification of the local board, the State Director advised Dr. Fein by letter dated October 31,

1968, that in his opinion Dr. Fein did not qualify for deferment as a conscientious objector and that his decision was based upon the information contained in Dr. Fein's Selective Service file. See Exhibit G.

On November 26, 1968, the National Selective Service Appeal Board classified Dr. Fein I-A by a unanimous vote of three to zero, thereby affirming the classification of the Appeal Board of the Southern District of New York. See Exhibit H.

5. Registrant was asked at both of his personal interviews whether he would be willing to work in an institution as a conscientious objector doing civil work in the national interest. He replied that he would.

6. If Dr. Fein were inducted into the Armed Services and if he requested officer status as a doctor, he would be commissioned a captain and receive base pay of $658.50 per month plus special doctor's pay of $100 per month. Dr. Fein would be credited with the four years he spent in medical school in ascertaining this base pay. The above referred to $758.50 per month would be taxable. In addition, Dr. Fein would receive 130.05 per month for quarters, which is the monthly rate for a married officer, and an additional $47.88 per month for subsistence. Accordingly, Dr. Fein would receive $9,102 a year of taxable income together with an additional $2,135.16 per year as a non-taxable allowance for quarters and subsistence.

7. The information contained in this affidavit and the exhibits annexed hereto was obtained from the Selective Service file for the registrant. The information contained in paragraph 6 was obtained from Colonel Daniel Lewis, a field attorney for the Selective Service System.

WHEREFORE, it is respectfully requested that the motion for preliminary injunction and summary judgment be denied and that the complaint be dismissed for lack of subject-matter jurisdiction.

Affidavit of Martin Paul Solomon
in Opposition to Plaintiff's Motions

MARTIN PAUL SOLOMON
Assistant U.S. Attorney

Sworn to before me this
8th day of April, 1969.

[Exhibits A-H of the Solomon affidavit are omitted here and are included as exhibits to the affidavit of Oliver Fein, *supra*]

AFFIDAVIT OF MICHAEL B. STANDARD IN SUPPORT OF PLAINTIFF'S MOTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

MICHAEL B. STANDARD, being duly sworn, deposes and says:

1. I am a partner in the firm of Rabinowitz, Boudin & Standard, attorneys for the plaintiff herein. I make this Supplemental Affidavit after hearing in support of plaintiff's motions for injunctive relief and summary judgment.

2. Central to the Government's position that there is no due process right of the registrant to submit additional or rebutting information to the Appeal Board is the Government's assertion that the Appeal Board, consistent with 32 CFR 1626.24, has before it for *de novo* review purposes, only the record submitted to the local board.

3. Both in the Government's brief and at oral argument, it stated unequivocally that neither the State Director nor any other body or officer submitted any information to the Appeal Board other than what appeared in the registrant's file as reviewed by the Local Board. Construed most charitably, the Government is in error.

4. On June 20, 1968, the day the Southern District Appeal Board found the registrant not to be appropriately classified in I-O, Miss Jacqueline Jones, Assistant Appeal Board Clerk, by direction of the Southern District Appeal Board forwarded a memorandum to the registrant's local board which in pertinent part stated as follows:

"... [P]lease be advised that we have already made up *the brief* on the above-named subject, and is to go into today's meeting (June 20, 1968)." [Emphasis added]

This quotation is part of a memorandum which is annexed hereto as Exhibit A, and was photocopied from the registrant's Selective Service File.

5. The Government refers to a representation by the Deputy state Director that "it is our opinion that the registrant would not qualify for I-O classification..." (Govt. Ex. B) as conclusive evidence that the Deputy State Director submitted no additional information to the Appeal Board. While it is not clear that the State Director drafted "the brief" referred to in Exhibit A annexed hereto, it is perfectly clear that the Appeal Board had before it material of which the registrant was never advised.

WHEREFORE it is respectfully requested that plaintiff's motions for preliminary injunctioln and summary judgment be granted.

/s/ Michael B. Standard

Sworn to before me this
29th day of April, 1969.

/s/ Theresa Silverstein

Affidavit of Michael B. Standard
in Support of Plaintiff's Motions

EXHIBIT A
[Annexed to above affidavit]

Memo to Local Board No. 7 from Southern District Appeal Board

SELECTIVE SERVICE SYSTEM

[Local Board Stamp)

Memorandum to: Local Board No. 7
From: Southern District Appeal Board
Yonkers, New York 10701

SUBJECT: FEIN, OLIVER T.
S.S. No: 30 7 40 172

Please be advised that we are in receipt of a letter from Doctor Frederick O. Robbins, attesting Doctor Oliver T. Fein feelings towards Conscientious Objector.

However, please be advised that we have already made up the [brief] on the above-named subject, and is to go into today's meeting (June 20, 1968).

By Direction
Southern District Appeal Board

/s/ Jacqueline Jones
Assistant Appeal Board Clerk

AFFIDAVIT OF MARTIN PAUL SOLOMON IN RESPONSE TO THE AFFIDAVIT OF MICHAEL B. STANDARD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MARTIN PAUL SOLOMON being duly sworn deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, attorney for the defendants in this action, and as such am familiar and in charge of this case.

2. I submit this affidavit in response to the affidavit of Michael B. Standard, sworn to on April 29, 1969.

3. Upon information and belief, the "brief" referred to in the memorandum of June 20, 1968, annexed as Exhibit A to Mr. Standard's affidavit, is merely a summary of the registrant's Selective Service file which is submitted to the members of the appeal board together with the registrant's file. The "brief" is prepared by an employee of the appeal board and does not contain any information not contained within the file.

4. The information contained in this affidavit was ascertained by your deponent from telephone conversations with Jaqueline Jones who signed the June 20, 1968 memorandum annexed as Exhibit A to Mr. Standard's affidavit, with Mrs. Anna B. O'Hara, Clerk of the Southern District Appeal Board, and with Colonel Meader of the Selective Service State Headquarters.

/s/MARTIN PAUL SOLOMON
Assistant U. S. Attorney

Sworn to before me this
6th day of May, 1969.

MEMORANDUM OPINION OF THE COURT

UNITED STATES DISTRICT COURT
Southern District of New York

69 Civ. 531

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; *et al.*,

Defendants.

MEMORANDUM

Tyler, D.J.

Oliver Fein moves to preliminarily enjoin his local draft board and the appellate hierarchy of the selective service system from ordering him to report for induction into the Armed Forces of the United States. He moves also for summary judgment declaring that Section 460(a)(2) of the Military Selective Service Act, 50 App. U.S.C. §460(a)(2) (1968) and certain selective service regulations, 32 C.F.R. 1626.1 and 1627.1(a)(b), violate the due process clause of the Fifth Amendment, both on their face and as applied to him.

The registrant, a medical doctor currently practicing in the field of community and public health in Cleveland, Ohio, graduated from Swarthmore College in June, 1962, and Western Reserve University Medical School in June, 1967. He held a II-S (student) classification for the duration of his academic career, and upon graduation from medical school, he was granted a II-A

classification (work in the national interest) during his one year internship in pediatrics at Cleveland Metropolitan General Hospital. In September, 1967, while an intern, plaintiff sought conscientious objector status from his draft board, Local Board No. 7, located in Yonkers, New York. That classification was denied him and remained II-A. In February, 1968, upon being notified by his local board that he had been reclassified I-A, plaintiff again sought and then received conscientious objector status (I-O).

About two weeks after the local board's action, plaintiff's I-O classification was appealed by the State Selective Service Director to the Appeal Board for the Southern District of New York. Plaintiff at once sought from the local board and the appeal board a statement of reasons for the appeal but received, in his words, "no pertinent response". On June 20, 1968, the Appeal Board for the Southern District of New York overturned the actions of the local board and reclassified plaintiff I-A by a vote of 4-O. No reasons for the action of the appeal board were furnished to plaintiff. On September 16, 1968, the National Selective Service Director, at the prompting of plaintiff, appealed the action of the district appeal board to the Presidential Appeal Board, with notice to plaintiff. Prior to the decision of the Presidential Appeal Board, the State Selective Service Director, in response to a request by plaintiff, informed him by letter of October 31, 1968, that in his opinion plaintiff did not qualify for deferment as a conscientious objector and that his decision to appeal the local board's action was based upon the information contained in plaintiff's selective service file. On November 26, 1968, the Presidential Appeal Board, without a statement of reasons, upheld the action of the district appeal board, thereby retaining plaintiff in the I-A classification.

Plaintiff alleges here that Section 460(a)(2) of the Military Selective Service Act of 1967, 50 App. U.S.C. §460(a)(2) and 32 C.F.R. §§1626.1 and 1627.1 are unconstitutional in that: (1) they do not require notification to a registrant of the reasons for appeal by the State Selective Service Director; (2) they do not require a statement of reasons for a decision by the Selective Service District Appeal Board or by the Presidential Appeal Board; and (3) they do not offer a registrant the opportunity to present evidence at either the intermediate or the final appeal level. In short, plaintiff finds the statutory scheme for appeals, as implemented by the subject regulations, unconstitutional because it makes no provision for a statement of reasons for the actions of the various bodies and allows no opportunity to present evidence.

I do not reach the merits of these contentions in this action. Plaintiff's complaint is beset by various obstacles, not the least of which is the question of whether he can show jurisdiction of this court to hear this suit. Assuming, *arguendo*, that he can, he must also show that this court is not barred from exercising that jurisdiction by Section 10(b)(3) of the Military Selective Service Act of 1967, 50 App. U.S.C. §460(b)(3). I conclude that he cannot make this latter showing.

Section 10(b)(3) prohibits pre-induction judicial review "of the classification or processing of any registrant," such review being limited to a defense in a criminal prosecution or to habeas corpus after induction:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be

opposed to participation in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Without elaborate analysis, Section 10(b)(3), when read in light of the Supreme Court decisions in *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968), and *Clark v. Gabriel*, 393 U.S. 256 (1968), bars pre-induction review where plaintiff seeks to challenge a determination of fact, or an exercise of judgment or discretion by the local board, or, in this case, the appellate boards. The point is well made in *Clark v. Gabriel, supra* where the Court draws a distinction between *Oestereich*, where the Court held that pre-induction judicial review would not be barred by Section 10(b)(3), and *Clark*, where the Court held that such review would be barred:

"In *Oestereich* the deliquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment, By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being sustained by the local board.

Here the Board has exercised its statutory discretion to pass on a particular request for classification, 'evaluating evidence and. . .determining whether a claimed exemp-

> tion is deserved'. *Oestereich v. Selective Service Bd.*, *ante*, at 238." 393 U.S. at 258.

Thus, it can be reasoned that plaintiff does not seek to challenge such a discretionary determination. Rather, he challenges, on a strict legal or constitutional basis, the selective service appellate scheme as provided in the statute and relevant regulations. Consequently, my understanding, summarized above, of *Oestereich* and *Clark* at first blush would seem to justify the conclusion that plaintiff's action is not barred by Section 10(b)(3). A more recent Supreme Court case, however, vitiates this simple rationale.

In *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), *aff'd.* 393 U.S. 316 (1969), four selective service registrants challenged the constitutionality of the student deferments provided in Section 6(h)(1) of the Military Selective Service Act of 1967, 50 App. U.S.C. §456(h)(1) (1968) on grounds that the student deferments (1) discriminate against persons who are economically unable to attend college and (2) are arbitrary and bear no reasonable relationship to the purpose of the Act. The registrants, all classified I-A and alleging that they were unable to secure student deferments solely because they lacked the financial means to attend college, sought a declaratory judgment that the Act was unconstitutional as applied to them and injunctive relief. A three-judge panel in this district dismissed the action for lack of a justiciable controversy and for want of jurisdiction. This court reasoned that because the registrants had never been called for induction, and that there had been no showing that the amount in controversy exceeded $10,000, as required by 28 U.S.C. §1331 (1964), the claim was premature.

On direct appeal, the Supreme Court rules briefly as follows:

"Per Curiam

The judgment is affirmed, *Clark v. Gabriel, ante,* p. 256, without reaching the jurisdictional question raised under 28 U.S.C. §1331."

Confessing uncertainty as to the full meaning of the Court's cryptic citation of *Clark v. Gabriel* as the sole ground for affirmance in *Boyd v. Clark,* I nevertheless conclude that the latter case is dispositive of this case. Specifically, I am constrained to interpret the *per curiam* statement of the Supreme Court as an indication of its conclusion that the operative facts therein placed *Boyd v. Clark* in the class of pre-induction selective service suits barred by Section 10(b)(3) because they do not fit the exceptions carved out in *Oestereich*. As in *Boyd,* plaintiff here raises constitutional objections to a regulatory scheme administered by the selective service system. To be sure, certain facts and circumstances of *Boyd* are different in some respects from those in the case at bar; nevertheless, these differences, in my opinion, are insufficient to permit me to "distinguish" *Boyd* and refuse to apply its holding here.

Parenthetically, although neither plaintiff nor defendants have raised the point, this action could be interpreted as a suit to enjoin the operation of an act of Congress on grounds that it is repugnant to the federal Constitution. As such, it might provide the basis for a motion to empanel a three-judge district court under 28 U.S.C. §2282 (1964). A district judge, however, is entitled to dismiss such a complaint where the unsoundness of the constitutional question "so clearly results from the previous decisions of this [the Supreme] Court as to foreclose the subject. . . ." *Ex parte Poresky*, 290 U.S. 30, 31 (1933); *accord, California Water Service v. City of Redding*, 304 U.S. 252 (1938); see, also, the opinion of this court in *Green v. Board of Elections*, 259 F. Supp. 290 (S.D.N.Y. 1966), *aff'd*,

380 F. 2d 445 (1967), *cert. denied*, 389 U.S. 1048 (1968). Here, *Boyd v. Clark*, *supra*, effectively forecloses the jurisdictional issue.

Accordingly, plaintiff's motions are denied, and defendants' motion to dismiss the complaint is granted.

June 10, 1969.

/s/H.R. Tyler, Jr.
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 626—September Term, 1969.

(Argued March 24, 1970 Decided July 23, 1970.)

Docket No. 33737

OLIVER T. FEIN,

Plaintiff-Appellant,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*

HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.**

Appeal from an order by the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* dismissing an action by a selective service registrant, seeking an injunction against his induction and a declaration that his reclassification into I-A by the appeal board after his local board had classified him I-O was null and void. Affirmed.

* Of the District of Connecticut, sitting by designation.

MICHAEL B. STANDARD, New York, N. Y. (Rabinowitz, Boudin & Standard, of counsel), *for Plaintiff-Appellant.*

PETER R. DEFILIPPI, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Patricia M. Hynes, Assistant United States Attorney, of counsel), *for Defendants-Appellees.*

BLUMENFELD, *District Judge*:

Appellant is a doctor of medicine. While obtaining his education, he was classified II-S (student deferment), and upon graduation and while serving as an intern, he was classified II-A (occupational deferment). In September 1967, while still II-A, he wrote to the local board stating his conscientious objection to war and requesting the appropriate forms. He filed an application for a I-O (conscientious objector) classification and appeared before the local board. Finding that Fein did not qualify for a I-O "at that time," the board retained him in his II-A status. In February 1968 he was classified I-A by the local board, but following a personal appearance on May 22, 1968, that board found that he qualified as a conscientious objector and classified him I-O.

About two weeks later, this classification was appealed to the state appeal board by the State Director of Selective Service. 32 C.F.R. §1626.1 (1951). Appellant sought from both the local and appeal boards a statement of reasons for the appeal, notification of the standards to be applied on appeal, advice as to whether additional information outside his file was to be presented, and an opportunity to

rebut findings by the appeal board as to the appropriateness of his classification. He received no pertinent response before the decision of the appeal board was rendered. On June 20, 1968, the appeal board, by a vote of 4-0, reversed the local board and reinstated appellant in class I-A. It gave no reason for that action.

On September 16, 1968, the National Selective Service Director, at Fein's request (no right of appeal by the registrant being available from an unanimous vote of the appeal board, 32 C.F.R. §1627.3 (1967)), appealed the decision to the Presidential Appeal Board. 32 C.F.R. §1627.1(a) (1948). Meanwhile, on October 31, 1968, the state director wrote to Fein stating that in his opinion Fein did not qualify as a conscientious objector and that his decision to appeal the local board's I-O classification was based on information in Fein's selective service file. On November 26, 1968, the Presidential Board, without a statement of reasons, upheld the appeal board.

The appellant then brought this action in the district court seeking an injunction against his induction into the armed forces and a judgment that his reclassification from I-O to I-A was null and void.

Jurisdiction was predicated on 28 U.S.C. §§1331, 1343, 1361, 1391 and 2201, and on an allegation that the matter in controversy exceeded the value of $10,000 exclusive of interest and costs.[1]

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1 The Supreme Court has not yet ruled on the jurisdictional basis for an action by a selective service registrant seeking pre-induction review of his classification, although it has entertained several such cases on the merits. *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233, 239 (1968) (where the remand stated in part: "petitioner must have the opportunity . . . to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. §1331"); *Clark* v. *Gabriel*, 393 U.S. 256, 259 (1968) (where the Court granted leave to proceed *in forma pauperis*); *Boyd* v. *Clark*, 393 U.S. 316 (1969) (*affirming* 287 F. Supp. 561 (S.D.N.Y. 1968) "without reaching the jurisdictional question raised under 28

The plaintiff claimed that his reclassification from I-O to I-A violated his fifth amendment right to due process in that the regulations contained no provisions requiring notice to the registrant of the reasons for appeal by the State Selective Service Director, nor for a statement of the bases of decision by the respective appeal boards and did not provide for an opportunity to present evidence to rebut the state director's appeal.

Deciding that pre-induction judicial review of the plaintiff's classification was explicitly barred by 50 U.S.C. App. §460(b)(3) (§10(b)(3) of the Selective Service Act of 1967), Judge Tyler in a well-considered opinion denied the plaintiff's motion for summary judgment and dismissed the complaint for lack of subject matter jurisdiction. We agree.

Congress amended §10(b)(3) in 1967 to add an explicit bar to judicial review

> "of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . ."

in answer to *Wolff* v. *Selective Serv. Bd.*, 372 F.2d 817 (2d Cir. 1967), which had permitted pre-induction judicial review of local board reclassifications of two II-S registrants into class I-A because of their participation in a demonstration protesting American involvement in Vietnam. Within a year after the amendment, a challenge to its scope reached the Supreme Court in *Oestereich* v. *Selective Serv. Bd.*, 393

U.S.C. §1331"). Peremptory dismissal is seldom ordered unless it appears to a legal certainty that the claim is for less than the jurisdictional amount. *St. Paul Mercury Indemn. Co.* v. *Red Cab Co.*, 303 U.S. 283, 290 (1938). In this case, the court below did not reach the issue.

U.S. 233 (1968). Oestereich was a divinity student admittedly entitled to a statutory exemption from military service under §6(g) of the Act, 50 U.S.C. App. §456(g) (1967). His draft board declared that he was a delinquent and simultaneously reclassified him as I-A for having turned in his draft card in protest to American participation in the Vietnam war. Finding that the board had acted in a "blatantly lawless manner" by depriving him of his "statutory right" to an exemption, *id.* at 238-39, the Court held that to read the amendment literally to deny pre-induction review in such a case would be "to construe the Act with unnecessary harshness." *Id.* at 238.

Having departed to that extent from a literal reading of §10(b)(3),[2] the Court undertook to elaborate its *Oestereich* holding through its opinion in *Clark* v. *Gabriel*, 393 U.S. 256 (1968), decided the same day. *Clark* v. *Gabriel* held that §10(b)(3) of the Act barred pre-induction review of the denial of a claim to classification as a conscientious objector. The Court explained *Oestereich* as a case where the board action was "without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption." *Id.* at 258. Sharply distinguishing that situation[3] from the one before it, the Court said:

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2 The Court in *Oestereich* also noted that while §10(b)(3) on its face purports "to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent." *Id.* at 238.

3 *Breen* v. *Selective Serv. Bd.*, 396 U.S. 460 (1970), was held indistinguishable from *Oestereich*. The Court found that because there was no lawful basis for the use of delinquency regulations in that case to warrant the revocation of a statutorily mandated student deferment, §10(b)(3) did not preclude pre-induction review.

> "Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment." *Id.*

And, to avoid any risk of being misunderstood, Mr. Justice Douglas, who wrote for the majority in *Oestereich*, concurred in *Gabriel*, and after noting some hypothetical examples of lawless board action, went on to say: "[I]t takes the extreme case where the Board can be said to flout the law, as it did in Oestereich [393 U.S. at 233], to warrant pre-induction review of its actions." *Id.* at 260.

These two decisions by the Court convincingly dispel the notion that pre-induction review may be obtained simply by framing issues in terms of purely legal questions divorced from their factual context,[4] a tour de force attempted by the appellant in this case.

The limitation of pre-induction review to cases of "blatantly lawless" action by the board gained further confirmation in *Boyd* v. *Clark*, 393 U.S. 316 (1969), which affirmed a denial of pre-induction review to registrants classified I-A, in a one-sentence per curiam opinion: "The judgment is affirmed, Clark v. Gabriel [393 U.S. at 256], without reaching the jurisdictional question raised under 28 U.S.C. §1331." In *Boyd*, the plaintiffs challenged their classification on several legal grounds without in any way contesting the discretionary or fact-finding aspects of the local board's decision to classify them I-A. *See* opinion below, *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968). Indeed, among

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4 The government's Jurisdictional Statement in *Gabriel* shows that Gabriel raised several constitutional issues which could have been passed on without inquiry into findings of fact or exercise of discretion by the local board. See *Breen* v. *Selective Serv. Bd.*, 406 F.2d 636, 639 (2d Cir. 1969), *rev'd on other grounds*, 396 U.S. 460 (1970).

the constitutional claims asserted in *Boyd* were some which had a source in common with those asserted by the appellant here: the due process clause of the fifth amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

Although the law of new cases may never be open and shut,[5] we have been furnished with sufficient guidance to hold that an appeal board does not flout the law in a blatantly lawless manner merely because the President has not provided certain procedural safeguards to govern the Selective Service System's administrative tribunals in determining whether a registrant is a genuine conscientious objector not "subject" to combatant training or service under §6(j) of the Act, 50 U.S.C. App. §456(j) (1967). See *Falbo* v. *United States*, 320 U.S. 549, 554 (1944). Cf. *Estep* v. *United States*, 327 U.S. 114 (1946).

The appellant had no clear statutory right to a I-O classification. Allegations of constitutional infirmities in the classification procedures did not bring this case within any exception to the bar of §10(b)(3).

Accordingly, the order of Judge Tyler dismissing the complaint is affirmed.

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5 The view that §10(b)(3)'s proscription against pre-induction review imposes such a risk of severe penalty as to "raise serious constitutional problems" in challenges to the administrative procedure of classification itself without accompanying challenges to matters within the local board's discretion was suggested by Mr. Justice Harlan in his concurring opinion in *Oestereich*, 393 U.S. at 243, as a basis for a broader holding than that adopted by the majority of the Court. That view was implicitly rejected without discussion in *Boyd* v. *Clark*, 393 U.S. at 316.

Nor was the majority in *Breen* yet ready to adopt his view, again expressed by way of a concurring opinion in that case, that pre-induction review should not be limited to cases where there is a deprivation of a clear statutory right to a certain classification. Without reweighing all the values, the present rule does give some recognition to the purpose of Congress to limit pre-induction review.

HAYS, *Circuit Judge* (concurring):

I concur in Judge Blumenfeld's opinion in regard to §10(b)(3) but would also rely upon failure to establish the jurisdictional amount under §1331 as a ground for affirming the trial court's dismissal of the action. See *Boyd* v. *Clark*, 287 F. Supp. 561 (three judge court) (S.D.N.Y. 1968), aff'd on other grounds 393 U.S. 316 (1968).

LUMBARD, *Chief Judge* (dissenting):

I dissent.

After lengthy correspondence, two personal interviews, and extensive personal testimonials, Dr. Fein was granted conscientious objector status by his local board. The State Director, without stating any grounds, appealed the classification, and the State Appeal Board reversed and reclassified Fein I-A. The State Appeal Board gave no reasons for its decision, it did not permit Fein to submit a statement in support of his classification, and it may not even have relied solely on information in the file. In this suit to enjoin his induction Fein argues that such treatment does not meet minimum standards of due process, as developed by the federal courts over the last three decades. See, e.g., *United States* v. *Morgan*, 304 U.S. 1, 18 (1938). I agree.

The majority, however, holds that, as interpreted by the Supreme Court, Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. §460(a)(2), bars the preinduction review sought by Dr. Fein. I cannot accept my brothers' readings of the relevant Supreme Court decisions. To me, Fein's claim is not barred by the literal words of Section 10(b)(3), and I think the exception to that section recognized by the court in *Oestereich* v. *Selective Service*, 393 U.S. 233 (1969) reaches this case as both

here and in *Oestereich* a presidental regulation must fall to a higher command. I would also hold that the $10,000 jurisdiction amount required by 28 U.S.C. §1331 is satisfied by Fein's allegations.

I. *Section 10(b)(3)*

The language of Section 10(b)(3) prescribes preinduction review "of the classification or processing of any registrant." Concurring in *Oestereich*, Mr. Justice Harlan gave a gloss to those words which I accept. He read "classification or processing" to encompass "the numerous discretionary, factual and mixed law-fact determinations which a Selective Service Board must make prior to issuing an order to report for induction." 393 U.S. at 240. At issue in this case, however, are procedural rules governing appeals to the State and Presidential Appeal Boards, and I do not read Section 10(b)(3) as explicitly barring a claim that the procedures involved are invalid under the due process clause. At stake is not a board determination "processing or classifying" the registrant, but the procedures underlying the way such determinations are made.[1]

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1 This interpretation of the section is reinforced by its legislative history. In his *Oestereich* concurrence, Mr. Justice Harlan isolated two major considerations behind Congress' decision to defer judicial review of decisions involving classification or processing. First, because these determinations are of a highly discretionary nature, judicial review—although narrow—still would take considerable time, as often the courts must examine board records, hear testimony, and resolve controversies on a sizeable record. Second, it can be presumed that, with the full opportunity to be heard afforded by the system, a registrant's board has classified him properly, in accordance with the applicable statutes and regulations. See 393 U.S. at 240-41.

These factors, as Mr. Justice Harlan points out, are significantly altered when the registrant challenges a procedure used by the system. This sort of claim does not require the court to review discretionary determinations, so there is no protracted delay; usually, the case can be tried on a stipulated set of facts. Further, there can be no presumption of regularity, since the issues raised are beyond the system's

My brothers argue, however, that this interpretation of Section 10(b)(3) is foreclosed by the opinions of the court in *Oestereich, Breen* v. *Local Board No. 10,* 396 U.S. 460 (1970), and *Clark* v. *Gabriel,* 393 U.S. 256 (1968). A reading of these cases leads me to the opposite conclusion, as I find the claim of Board "lawlessness" Fein raises to be substantially similar to the situations presented in *Oestereich* and *Breen.*

Oestereich was enrolled as a divinity student preparing for the ministry when he turned in his draft card to protest the United States' participation in the war in Vietnam. Shortly thereafter, his local board declared him delinqent for failure to have his registration certificate in his possession and to keep the board informed of his local status. The Board then reclassified him I-A and, after an unsuccessful appeal, he was ordered to report. At that point, he brought suit to restrain his induction. *Breen* is quite similar, save that the petitioner was a college student with a II-S deferment when he was declared delinquent and reclassified I-A.

In *Oestereich,* the court framed the question presented as whether Section 10(b)(3) barred a preinduction challenge to a reclassification based on the delinquency regulation. The court held, first, that as there was no statutory authorization for the Board to revoke the statutorily-based ministerial exemption, its action was "basically lawless"; second, that Section 10(b)(3)'s restriction on preinduction re-

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competence, perhaps even its jurisdiction. On my reading of the legislative history, Congress passed Section 10(b)(3) to meet a specific problem: the vexatious delays caused by preinduction review of certain kinds of claims, see *Clark* v. *Gabriel,* 393 U.S. 256, 258-59 (1968). Had Congress wanted to prevent all registrants from seeking the aid of the federal courts on any matter involving the Selective Service System before induction, it would have used general language, not a specific prohibition covering only two areas.

view cannot, if it be constitutional, be read literally as a literal reading would command that the writ of habeas corpus be suspended; and third, that an exception must be implied to permit review of board actions which revoke a statutory right on the basis of a power conferred only by Selective Service regulations. *Breen* follows *Oestereich* closely, the only difference being that *Breen* had a statutory deferment rather than an exemption.

Clark v. *Gabriel*, 393 U.S. 256 (1968), decided the same day as *Oestereich*, confirmed Mr. Justice Douglas' statement in *Oestereich* that "[o]ur construction leaves §10 (b)(3) unimpaired in the normal operation of the Act." 393 U.S. at 238. Gabriel sought preinduction review of the board's refusal to grant him conscientious objector status. In holding that Section 10(b)(3) barred the suit, the court per curiam in a unanimous opinion explained *Oestereich*:

> "In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student was by statute, unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which the appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.' 50 U.S.C. App. §456(j) (1964 ed. Supp. III)."

393 U.S. at 258. To me, Fein's claim falls squarely within the *Oestereich* exception.

In *Oestereich*, *Breen* and this case, the registrant challenges a procedure unauthorized by statute, while claiming that the regulation deprives him of a right based on higher authority.[2] The difference, which I do not deem significant, is that in *Oestereich* the conflict posed was between a board regulation—the delinquency provision—and a statutory command, the ministerial exemption. Here, the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an a fortiori case for preinduction review. In neither *Oestereich*, *Breen*, nor this case are there any discretionary determinations of the system involved, nor are there any factual inquiries required. See *Bucher* v. *Selective Service System*, 421 F.2d 24, 27 (3 Cir. 1970) ("The Section bars pre-induction review only where there is a challenge to the System's resolution of factual questions in the classification or processing of a draft registrant"). In all these cases, the System acted in reliance on a purportedly valid regulation, in such a way as to deny the registrant a firmly established right. Since I would find that the *Oestereich* exception reaches Fein's case, I would hold it not barred by Section 10(b)(3).

If the *Oestereich* exception is to be read narrowly, so as to turn "on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification," *Breen* v. *Selective Service Bd.*, 396 U.S. 460, 468 (1970) (Harlan, J., concurring), I would recognize a third

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2 The Selective Service Acts themselves are silent about what procedures are to be followed on appeal; the only instructions are that appeals are authorized and are to be taken "in accordance with such rules and regulations as the President may prescribe." 50 U.S.C. App. §460 (b)(3). On the effect of such a delegation generally, see *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

exception into the section. This exception would permit preinduction review of claims, such as Fein's, that "the very statutes or regulations which the board administers are facially invalid." *Oestereich* v. *Selective Service System*, 393 U.S. at 240 (Harlan, *J.*, concurring). In *Oestereich* the court showed itself willing creatively to construe Section 10(b)(3); I think that the facts of this case require another exercise of construction here.

I do not believe that Congress, even if it so intended, could by a provision such as Section 10(b)(3) deprive the federal courts of their power to hear allegations that a governmental agency has denied a citizen procedural due process before the registrant is in custody. See 394 U.S. at 243 n. 6. My reading of the section and of its legislative history convinces me that Congress had no such intention. Of course, it is our duty to construe federal statutes, wherever possible, to sustain their constitutionality.[3] So, faced with the alternatives of a difficult inquiry into the section's constitutionality or a saving construction consistent with Congress' intend and the statute's clear wording, I would recognize another exception to the section to permit claims that an authorizing statute or board regulation is invalid because it is contrary to the Constitution.

My brothers, however, would read the Supreme Court's one sentence, per curiam affirmance in *Boyd* v. *Clark*, 393 U.S. 316 (1969), on the basis of *Clark* v. *Gabriel*, to fore-

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3 See, e.g., *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932):

> "When the validity of an Act of Congress is drawn into question, and even if a serious doubt is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided."

See also *United States* v. *Seeger*, 380 U.S. 163, 188 (1965) (Douglas, *J.*, concurring); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, *J.*, concurring).

close this exception. In my view, *Boyd* is completely distinguishable. The petitioners in *Boyd*, four college-age youths who alleged they could not afford to attend college, sought to challenge the constitutionality of student deferments on equal protection and due process grounds. Without reaching the effects of Section 10(b)(3), the three-judge district court dismissed on the ground that the case was not ripe for adjudication since none of the petitioners had yet been called for induction. 287 F. Supp. 561 (S.D.N.Y. 1968).[4]

The reasons for the rule are sound. Since the registrant may never be called, the rule serves to protect the system "from becoming entangled in litigation which may be unnecessary." *Boyd* v. *Clark*, 287 F. Supp. at 564. Although this rule predates Section 10(b)(3), Congress obviously intended that it be codified therein. See Senate Rpt. No. 209, 90th Cong., 1st Sess. (1967), 1967 U. S. Code & Admin. News 1308; *National Student Ass'n* v. *Hershey*, 412 F.2d 1103, 1107 (D.C. Cir. 1969).

In terms of *Clark* v. *Gabriel* petitioners in *Boyd* stood vis-a-vis their local boards in an unsettled position, as their boards might have to make several discretionary decisions, involving "a determination of fact and an exercise of judgment," *Clark* v. *Gabriel*, 393 U.S. at 258, before issuing orders to report. For example, the Board might be asked to consider new requests for exemptions or deferments, which of course involve discretion. Even determining the order of call is heavily tinged with discretion, as the local board has extensive powers to alter the order as between registrants with I-A status. See 32 C.F.R. §§1631.7, 1632.2;

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4 As an alternative grounds for dismissing the action, the court held that the jurisdictional amount requirement of 28 U.S.C. §1331 had not been met. In affirming, the Supreme Court specifically avoided this question. See part II *infra*.

United States v. *Weintraub*, slip opinion 3421 (2 Cir., June 23, 1970); *Green* v. *Local Board No. 87*, 419 F.2d 813 (8 Cir. 1970).

In affirming *Boyd* on the basis of *Clark* v. *Gabriel*, it seems to me that the court looked not to the nature of the issue presented—which, like Fein's claim, was solely a question of law based on a constitutional challenge—but to the fact that petitioners there had not reached a position of finality within the system. To allow suits before a notice of induction is received would create exactly the sort of "'litigious interruptions of procedures to provide necessary military manpower' which Congress sought to prevent when it enacted §10(b)(3)," *Clark* v. *Gabriel*, 393 U.S. at 255-256 (quoting Sen. Russell). As Fein has been ordered to report, *Boyd* v. *Clark* has no relevance to this case.

II. *Jurisdictional Amount*

Having found that Fein's action was barred by Section 10(b)(3), neither Judge Blumenfeld nor the district court reached the question of whether Fein's allegation that more than $10,000 was in controversy in the present action satisfied the requirements of 28 U.S.C. §1331 (1964). My brother Hays, however, advances jurisdictional amount as a second ground for affirming the judgment below, and with this I disagree.

Judge Hays, arguing from the position he expressed in his opinion in *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), begins with the proposition that the amount in controversy must be reasonably capable of monetary valuation. He then would find the jurisdictional amount here unsatisfied even though Fein was never allowed to prove his allegation, so his second proposition must be that because the value of the rights denied is inherently incapable

of valuation, a registrant can never satisfy Section 1331. Any such per se rule, however, has recently been rejected by this court. In *Berk* v. *Laird*, slip op. 3379, 3385 (June 19, 1970), we held that a soldier who alleges that he is being unconstitutionally ordered into a war zone has met the requirements of Section 1331, since the allegedly unconstitutional action of the government might lead directly to his suffering serious injury or death.

Berk demonstrates that when traversing a jurisdictional allegation, the defendant has a heavy burden. Moreover, the Supreme Court has made it clear that

> "The rule governing dismissal for want of jurisdiction in cases brought in the federal courts is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

St. Paul Mercury Indemnity Co. v. *Red Cab Co.*, 303 U.S. 283, 288 (1938). Although Fein seeks an injunction, not money damages, the same rule applies, with the inquiry looking to "the value of the right to be protected or the extent of the injury to be prevented." C. Wright, Federal Courts, §34, at 116 (2d ed. 1970). For all that appears at this stage, Fein's allegation may rest on a good faith belief that service will result in monetary loss: he may be deprived of several years lucrative private practice or an opportunity for further, specialized training which will permit him to earn more later in his career. In the absence of bad faith or a legal certainty that the allegation is groundless, we must credit the claim. Fein certainly made his al-

legation in good faith, and in light of *Berk* v. *Laird* it cannot be said that as a "legal certainty" the dollar value of what he will lose if illegally drafted is not at least $10,000.

Further, I think that we are required to give the most liberal possible readings to jurisdictional allegations in cases such as this. See *Murray* v. *Vaughn*, 300 F. Supp. 688, 694 (D. R.I. 1969); *Moylan* v. *Laird*, 305 F. Supp. 551, 553 (D. R.I. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969). For if the $10,000 requirement of Section 1331 closes the doors of the federal courts, petitioners complaining of unconstitutional acts by the Selective Service System will have nowhere to go for relief. Mandamus under Section 1361 is rarely available,[5] the Selective Service System itself has neither the competence nor the power to pass on the constitutionality of procedures mandated by presidential regulations, and in this context, the concurrent jurisdiction of state courts is highly questionable. See Comment, Draft Reclassifications for Political Demonstrators—Jurisdictional Amounts in Suits Against Federal Officers, 53 Corn. L.Q. 916, 926-929 (1968).

Since Fein clearly can sustain his jurisdictional allegation, I need not consider the case of a poor man who stands to lose nothing but his most precious personal liberties if the unconstitutional actions of the federal government are beyond the reach of the courts. But if that case ever comes before us, I have grave doubts that the old rule requiring the claimed deprivation be capable of monetary valuation would long endure.

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5 Compare *Feliciano* v. *Laird*, —— F.2d —— (2 Cir., April 16, 1970), with *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2 Cir. 1968), cert. denied, 394 U.S. 929 (1969).

III. *The Merits*

Under the regulations, the State Director may appeal any classification of the local board at any time. Section 1626.1. He may attach to his appeal a statement specifying the grounds for his appeal. Section 1626.12.[6] In reviewing the appeal, the Appeal Board has the following warrant:

> In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:
>
> (1) Information contained in the record received from the local board.
>
> (2) General information concerning economic, industrial, and social conditions.

Section 1626.24(b). Apparently, it also may consider the information contained in the appellant's statement. If he deems the matter to be "in the national interest or necessary to avoid an injustice," the State Director may appeal any determination of the Appeal Board to the Presidential Appeal Board. Section 1627.1.[7]

Fein claims these procedures violate due process in that (1) they do not require that the registrant be notified of

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6 Section 1626.12 provides that:

> "The person appealing may attach to his appeal a statement specifying the matters in which he believes the board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

7 The regulations provide that if there has been at least one dissent at the state level, the registrant himself may appeal. Section 1627.3. Here, however, the state board had reversed Fein's classification unanimously, and the State Director took an appeal for the registrant.

the reasons for appeal advanced by the State Director; (2) no statement of the reasons for the Appeal Board's decision is required; and (3) the registrant-appellee is given no chance to submit evidence, information or arguments to the Appeals Board.

Fein's first claim—that when the State Director, as appellant, chooses to exercise his right under Section 1626.12 to submit a statement, the registrant must be given a copy and be provided an opportunity by the Appeals Board to offer a rebuttal—is unquestionably correct. See *United States* v. *Cummings*, 425 F.2d 646 (8 Cir. 1970); *Weiner* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969). In *Gonzalez* v. *United States*, 348 U.S. 407 (1965), the Supreme Court unequivocally stated that at least so much is required by minimum notions of due process. There, the registrant was not shown a Department of Justice recommendation on his request for conscientious objector status.[8] Reversing his conviction the Court noted:

> [A] registrant [must] be given an opportunity to rebut this recommendation when it comes to the Appeals Board, the agency with the ultimate responsibility for classification.

348 U.S. at 412. The State Director's statement on appeal, which may refer to any information on the registrant's file "which [the person appealing] believes the local board has failed to consider or to give sufficient weight," is indistinguishable from the Justice Department's recommendation under the formal procedure.

Here, however, the State Director by affidavit stated that he did not exercise his option to append a statement to his

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8 This procedure is no longer in effect, having been repealed by the Military Selective Service Act of 1967. 50 U.S.C. App. 456(j) (1964), repealed by P.L. No. 90-40, §1(7) (1967).

notice of appeal; rather his letter to the Appeal Board noted only that in his opinion Dr. Fein did not qualify for I-O status and that his opinion was based on information in Fein's file. In this posture, Fein's argument must be that due process compels the State Director to frame the issues on appeal or, in the alternative, that registrant-appellee be given an opportunity by the Appeal Board to support the local board's decision. As to the first, the government might convincingly argue that since the Appeal Board hears and decides each case *de novo*, if the appellant-Director does not choose to frame the issues, the registrant is not at any disadvantage.

Fein's alternative contention seems far stronger. Under the regulations, Fein, as appellee, has no right to submit anything in support of the classification below. Certainly, it would be helpful to the Board if the registrant could submit a short statement which marshals the evidence in support of his classification. Fein apparently sought permission to file such a statement with the Appeal Board, but received no response to his inquiry. If the State Director can submit a statement to support his appeal, I think fundamental fairness requires that similarly the registrant-appellee be permitted to be heard in support of the classification he has received.

Fein also argues that the Appeal Board's practice of refusing to give reasons when reversing a classification favorable to the registrant also violates due process. We have recently held that, at least when the registrant appeals, due process is not violated as long as "[t]here was sufficient evidence in the file for appellant to determine the basis for the denial of his claim." *United States* v. *Morico*, 415 F.2d 139, 143 (2 Cir. 1969), rev'd on other grounds, 39 U.S.L.W. 3520 (1970). When, however, it is the State

Director who appeals, several considerations lead me to conclude that a different standard must obtain.

First, the Appeal Board is empowered by the regulations to take cognizance of "general information concerning economic, industrial, and social conditions." Section 1626.24(b). This is an unusual provision, going well beyond the confines of judicial notice. See Preliminary Draft, Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 2-01 (March 1969).[9] Further, the registrant is not informed that the Board is in any way depending upon outside information in reaching a decision nor is he given a chance to rebut its accuracy or relevance. Although our review of a draft classification is tightly proscribed to "any basis in fact," the basis in fact must either be within the four corners of the file, see *United States* v. *Abbott*, —— F.2d —— (9 Cir., April 28, 1970) or the registrant must have been informed of any outside information which is to be considered before the Board decides and given a chance to rebut.

To my mind, the use of such information should be tightly circumscribed. Not only may this information, gathered from well-neigh any source and unchecked by any sort of rebuttal, be simply wrong, see *Bengoecha* v. *Micheli*, 295 F. Supp. 257 (D. P.R. 1969), but it might lead

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9 The Draft Rule imposes strict controls on judicial notice:

"(b) Kinds of Facts. A judicially noticed fact must be either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute."

Rule 2-01(b). Further, provision must be made for challenges:

"(e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed."

Rule 2-01(e).

to wholly invalid inferences.[10] To prevent such misinformation, I would require the Appeal Board either to disclose in advance any "general information" it thinks relevant and give the registrant a chance to rebut or else positively to disclaim any such reliance.

Second, I note that several circuits have now adopted a rule requiring that when a registrant establishes a prima facie case for conscientious objector status, the local board and the Appeal Board must state their reasons for denying the request. In *United States* v. *Houghton*, 413 F.2d 736 (9 Cir. 1969), the Ninth Circuit in reversing a conviction of a conscientious objector for failure to report, stated that

> "Inconsistent statements of actions or a finding of insincerity may support the denial of conscientious status. The local board, however, must state the reasons for the denial of a requested classification when a registrant has 'met the statutory criteria' for classi-

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10 The possibility of this latter sort of error is strong in this case. I note that Fein, in his Selective Service Form 150, stated that while an intern at a highly respected Cleveland hospital, he voluntarily chose to live in the Cleveland ghetto and contributed the very little free time he had to a neighborhood free clinic. The clinic was run by the Students for a Democratic Society. Can any court say with assurance that the Appeal Board may not have seized upon this fact and read it out of context against Fein, under its license to consider "general information about . . . social conditions?"

Even if it be assumed that Fein belonged to SDS and that an inference going to the sincerity or content of a conscientious objector claim could be drawn from the fact of active membership, I am certain that the New York State Appeal Board has no knowledge whatsoever of the principles and ideology of an SDS chapter in Cleveland more than four years ago. It goes without saying that before any inferences may be drawn, there would have to be positive proof that these tenets disqualified a subscriber from conscientious objector status, that Fein knew these tenets, and that he affirmatively embraced them. See, e.g., *Law Students Civil Rights Research Council* v. *Wadmond*, 299 F. Supp. 117, 131 (S.D.N.Y. 1969), prob. juris. noted, 38 U.S.L.W. 3253 (Dec. 10, 1969).

> fication or . . . has placed himself 'prima facie within the statutory exemption.' Otherwise a court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statements, even if true, did not entitle him to the classification, or on the reasonable disbelief of certain allegations necessary to the registrant's prima facie case."

413 F.2d at 739 (citations omitted). Accord, *United States* v. *Broyles*, —— F.2d —— (4 Cir., March 19, 1970) *(en banc)*.

Whether or not the local board need so state reasons whenever a prima facie case is established, see *Morico* v. *United States, supra,* I think it clear that the Appeal Board must do so when the registrant has been granted I-O status below. If in defense to a criminal prosecution for refusal to submit to induction Fein obtains judicial review of this decision, the court would be limited to the "any basis in fact" standard. This means that we would search his file to find any rationale which would support the Appeal Board's decision. In the usual case, where both bodies have rejected the registrant's claim, perhaps this approach is adequate; in any case, it is settled law that our review is so limited. But when the local board has found that the registrant is sincere in his beliefs and that his beliefs meet the statutory criteria, I think a search through the file for any rationale to support the Appeal Board is impermissible. Although the Appeal Board is nominally superior to the local board, I cannot see that its judgment, without the benefit of an interview with the registrant, is to be preferred unless accompanied by an explanation. If it does not agree with the local board, it must state in what ways

it disagrees. Otherwise, reviewing courts—as both the Fourth and Ninth Circuits have found—are blind to potential mistakes of law made by the Appeal Board in the difficult area of conscientious objector classifications.

Thus, when the State Director appeals, due process requires: first, that the registrant be given a copy of any statements the State Director submits on appeal and then be given a chance to respond; second, that the registrant be given the opportunity to submit a statement in support of his classification; third, that the Appeal Board positively disclaim any reliance on "general information" or, if it has so relied, give the registrant ample notice of the information it thinks relevant and a chance to rebut; and fourth, the Appeal Board state the rationale for any decision which reverses the local board.

I would reverse the judgment of the district court and remand with instructions that the injunction Fein seeks should issue.

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Supreme Court of the United States

October Term, 1970

No. ~~1129~~ 70-58

OLIVER T. FEIN,

Petitioner

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1970

No.

OLIVER T. FEIN,

Petitioner

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Oliver T. Fein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 24, 1970.

OPINIONS BELOW

The opinion of the District Court is unreported and is set forth *infra*, pp. 19-24. The opinion of the Court of Appeals is reported at 430 F. 2d 376, and is set forth *infra*, pp. 25-48.

Jurisdiction

The judgment of the Court of Appeals was entered on July 24, 1970. An extension of time to file this petition until December 19, 1970 was granted by Mr. Justice Harlan on October 16, 1970. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

Questions Presented

1. Is a selective service registrant denied due process of law where a determination by his Local Board that he is entitled to conscientious objector status was appealed by the State Director and reversed by the State Appeal Board under procedures which, on their face and as applied in this case, do not require

a. the State Director to assign reasons for instituting an appeal;

b. disclosure to the registrant of statements by the State Director which are submitted to the Appeal Board;

c. the Appeal Board to afford the registrant an opportunity to reply to such statements;

d. the Appeal Board to accept a statement by the registrant in support of his classification;

e. the Appeal Board to confine its considerations to the record, but rather affirmatively permits the Board to utilize, without notifying the registrant, "general information regarding economic, industrial and social conditions in the community" which do not appear in the registrant's selective service file;

f. the Appeal Board to afford the registrant an opportunity to rebut any information the Board deems relevant; and

g. the Appeal Board to state the reasons for reversing the classification?

2. Does the general delegation of power to the President in 50 U.S.C. App. §460(b)(3) to prescribe "rules and regulations" for the prosecution of appeals constitute a statutory authorization for the summary procedures described above?

3. Was the State Director authorized by statute to prosecute an appeal from a determination by the local board favorable to the registrant?

4. Where petitioner has exhausted all administrative procedures and been ordered to report for induction and that order is predicated upon "blatantly lawless" conduct by an appeal board of the Selective Service System, is a district court barred from reviewing petitioner's reclassification prior to induction by Section 10 (b)(3) of the Selective Service Act of 1967 or by the jurisdictional amount requirement stated in 28 U.S.C. §1331(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Article III, §2 and the Fifth Amendment of the Constitution; 50 U.S.C. App. §460(b)(3); 28 U.S.C. §1331; 32 C.F.R. §§1623.2, 1626.1, 1626.11, 1626.12, 1626.24(b), 1627.1, 1627.3(a) are set forth *infra* pp. 49-50.

STATEMENT OF THE CASE

A. Selective Service Classification History of Petitioner

Petitioner is a doctor of medicine, currently practicing in the field of community health in New York City. He is a registrant of Local Board 7, Yonkers, New York, which had classified him as a student (II-S) for the duration of his academic career. Thereafter registrant received a II-A occupational deferment for one year for performance of work in the national interest coinciding with his internship in medicine and pediatrics at Cleveland Metropolitan General Hospital.

In September, 1967, while petitioner was occupationally deferred, he indicated to his Local Board by letter that he was conscientiously opposed to participation in war in any form by reason of his religious training and belief and thereafter filed a conscientious objector application form.

In support of his application, petitioner had recited early and rigorous training by parents, the Lutheran Church, a Quaker education, his participation in the civil rights movement, his medical training and his activity while an intern establishing a ghetto community health project in 1966, at the request of the Students for a Democratic Society.[1]

Subsequently the Local Board carefully canvassed petitioner's claim both by examination of his demeanor and beliefs at two personal interviews and by examination of reference letters from a clergyman, the Dean of Western Reserve Medical School, and numerous colleagues. After the first interview on November 15, 1967, the Local Board, consistent with 32 C.F.R. 1623.2, which requires that a registrant be placed in the lowest classification to which he is entitled, retained him in classification II-A stating that he did not qualify as a conscientious objector "at that time".

Following reclassification to I-A and a subsequent detailed personal interview, the Local Board on May 27, 1968, found that petitioner met the standards of sincerity and opposition to participation in war in any form based upon his religious training and belief, and classified him as a conscientious objector (I-O).

B. Administrative Appeals

On June 4, 1968, petitioner received letters from both his Local Board and the State Director advising him that the State

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1. The nature of his religious belief as detailed to the Local Board is set forth *infra*, p. 51.

Director intended to appeal the Local Board's finding of conscientious objector status. Immediately upon notification, petitioner wrote both to the Local Board and to the Appeal Board, requesting:

(a) a statement of reasons for the appeal,

(b) notification of the standards to be applied on appeal,

(c) advice as to whether any additional information, other than that contained in his Selective Service file was to be presented to the Appeal Board,

(d) an opportunity to rebut any statement of reasons or findings by the State Director as to the propriety of his conscientious objector classification.

Petitioner, although he requested the information on at least two occasions, never received a pertinent response. The only response of any kind from the Appeal Board to the inquiries by petitioner was a form styled Individual Appeal Record dated June 20, 1968 which stated that by a vote of 4-0 he had been classified I-A. No reasons were given on that form or otherwise for the reclassification nor was there any statement of the standards used in concluding that the Local Board had erred in finding petitioner to be a conscientious objector.

On July 31, 1968, petitioner was ordered to report for induction[2]

C. Judicial Review

On February 10, 1969, petitioner filed suit in the United States District Court, Southern District of New York, seeking a judgment declaring the Selective Service appellate regulatory scheme unconstitutional as a violation of the due process clause and seeking an order enjoining respondents from ordering petitioner's induction and restoring him to his I-0 status.

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2. This order was subsequently postponed and then cancelled pending review.

Respondents moved to dismiss the complaint on April 8, 1969 on the grounds, *inter alia*, that the District Court had no jurisdiction pursuant to Section 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. §460 (b)(3). Following briefing and oral argument, the District Court on June 11, 1969, although expressing uncertainty as to the applicability of the statute, denied petitioner's application on the grounds that Section 10(b)(3) acted as a bar to the assumption of jurisdiction. See *infra*, p. 19-24.

On July 23, 1970, the Court of Appeals for the Second Circuit affirmed. The majority sustained the District Court's finding of the applicability of Section 10(b)(3) as a bar to pre-induction review. See *infra*, p. 26. Judge Hays concurred, finding in addition that petitioner's failure to establish the jurisdictional amount under 28 U.S.C. §1331(a) deprived the court of subject matter jurisdiction. See *infra*, p. 32.

Chief Judge Lumbard, in dissent, found that the exception to §10(b)(3) carved out by this Court in *Oestereich v. Selective Service Local Board No. 11* and *Breen v. United States* was applicable, that the jurisdictional amount was satisfied by petitioner's allegations and that the actions of the State Director and the Appeal Board and the appellate regulatory scheme failed to meet minimum standards of fairness. See *infra* p. 32. In addition, Judge Lumbard noted the likelihood that the Appeal Board had utilized information outside of the record as constituted by petitioner's Selective Service file and might have indulged in an unwarranted political inference that petitioner's activities as a doctor in a clinic sponsored by the Students for a Democratic Society disqualified him from status as a conscientious objector. See *infra*, p. 46.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted in this case because it involves important issues of federal law, both constitutional and statutory, which have not been but should be decided by this Court.

In this case, a Selective Service registrant's conscientious objector status was summarily revoked by the State Appeal Board without affording him notice, an opportunity to be heard in rebuttal and a statement of reasons. In short, the appeal procedures employed in this case denied the registrant those minimal procedural safeguards to which the decisions of this Court, directly or by necessary implication, say he is entitled. A ruling on this point by the Court is also necessary to resolve a sharp conflict in the Circuits over the registrant's right to be notified of the reasons for denial of I-0 classification by the Local and Appeal boards.

The petition also presents the substantial questions of whether the summary procedures described above and, indeed, whether the State Director's assertion of power to appeal a Local Board determination in granting I-O status, are authorized by statute.

Finally, the petition raises a profoundly important question, which has required this Court's attention several times in recent years: does §10(b)(3) of the Selective Service Act of 1967 require the petitioner to risk a felony conviction or relinquish his liberty and religious convictions to the military before the federal courts will review the procedural unfairness and jurisdictional excesses to which he was subjected by the State Director and Appeal Board? See *Gutknecht v. United States*, 396 U.S. 295; *Breen v. Selective Service Local Board No. 16*, 396 U.S. 460; *Oestereich v. Selective Service Local Board No. 11*, 393 U.S. 233.

2. The State Director appealed the Local Board's determination made upon extensive personal examination and review of his Selective Service file granting petitioner conscientious

objector status. There is no apparent reason for the State Director's action and none was stated by him, the Local Board or the Appeal Board. The State Director prosecuted and the Appeal Board considered the appeal, ignoring completely petitioner's request for a statement of the basis for the appeal, an opportunity to submit a statement on his own behalf and to rebut information the Board deemed derogatory, and a statement of reasons in the event that the Board's decision is adverse to his interests. There is also a strong indication, noted by Chief Judge Lumbard in his dissent, that the summary reversal by the Appeal Board may have been based in part on information extrinsic to the record, of which petitioner was not given notice and consequently was unable to rebut.

Nothing in the Selective Service regulations required the State Director, or the Appeal Board, to act in a more open and deliberative fashion.

There can be no doubt that a registrant, facing the consequences that follow from a I-A classification, is entitled to fairer treatment than that afforded petitioner. In fact, the summary procedures followed by the Appeal Board are irreconciliable, as Chief Judge Lumbard found, with this Court's decision in *Gonzales v. United States*, 348 U.S. 407. *Gonzales* held that a registrant must be given an opportunity to see a Department of Justice recommendation concerning the propriety of a I-O classification and "to rebut this recommendation when it comes to the Appeal Board." *Id.* at 412. See *infra*, p. 43.

The same opportunity for notice and rebuttal was held to be applicable to the Justice Department hearing. *Simmons v. United States*, 348 U.S. 397.[3] In *Simmons*, the Court ruled that a conscientious objector applicant must be given a fair résume of an F.B.I. report prepared as part of the Department's inquiry, which preceded the hearing. See also *United States v. Nugent*, 346 U.S. 1.

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3. The Justice Department review procedure was repealed by the Military Selective Service Act of 1967, 50 U.S.C. App. 456 (j).

Gonzales, Simmons and *Nugent* express the unquestionable and more general right of every person subject to administrative regulation, particularly where that regulation affects his liberty and religious freedom, to notice and a hearing. This Court recently said in *Goldberg v. Kelly*, 397 U.S. 254, 267, that the "fundamental requisite of due process of law is the opportunity to be heard" and this includes "timely and adequate notice detailing the reasons" for the action which an administrative agency proposes to take.

Given this standard the State Director was required to state the basis of his appeal with notice to the petitioner. Obviously, in the absence of defined issues, petitioner's right to be heard is meaningless.

Moreover, in the context of this case, petitioner was entitled, at the very least, to a copy of any statements filed with the Appeal Board by the State Director, to submit a statement in support of the local board's determination and in response to the State Director's statement, and to notice of and an opportunity to rebut any information, within or outside the record, which the Appeal Board regards as derogatory and intends to rely upon. See *United States v. St. Clair*, 293 F. Supp. 337, 341 (E.D.N.Y. 1968).[4]

Petitioner's right to a statement of findings and reasons by the Appeal Board for its reversal of the Local Board's determination is equally fundamental. As Mr. Justice Frankfurter ruled in *S.E.C. v. Chenery Corp.*, 317 U.S. 80, 94. "... the orderly functioning of the process of review requires that the

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4. Compare: *Scott v. Volatile*, ——F.2d—— (3d Cir. 1970) 3 SSLR 3281; *United States v. Washington*, 392 F. 2d 37 (6th Cir. 1968); *United States v. Lemmens*, ____ F.2d ____ 3 SSLR 3185; *United States v. Abbott*, 425 F. 2d 910 (8th Cir. 1970; *Caverly v. United States*, ____F. 2d ____ (8th Cir. 1970) 3 SSLR 3194; *United States ex rel. Brown v. Resor*, ____ F. 2d ____ (9th Cir. 1970) 3 SSLR 3188.

grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." The Court's view in *Goldberg v. Kelly, supra* at 271, was to the same effect, namely, that the "decision maker should state the reasons for his determination and indicate the evidence he relied on. . ." See also *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 510-511.

Delineation by the Appeal Board of the basis for its decision insures not only effective judicial review but also that the review will be as swift and as narrowly confined as Congress intended. Without specification, the courts will be compelled to labor through the entire record to determine whether the board properly applied the correct legal standards. Even then the inquiry would not end, since without specific findings the reviewing court must assure itself that the Board has not, as it may have in this case, relied upon information extrinsic to the record. See *Goldberg v. Kelly, supra* at 271.

The rights petitioner seeks to enforce are all the more important, as Chief Judge Lumbard concluded, because the Appeal Board may take cognizance of "general information concerning economic, industrial, and social conditions." See 32 CFR §1626.24(b). Whatever this vague authority may encompass, and it should be "tightly circumscribed", as Chief Judge Lumbard noted, it is clear that the authorization exceeds the confines of judicial notice. Chief Judge Lumbard found that in this case there was a serious danger that the Board had based its decision on "invalid inferences" drawn from the fact that in 1966, while petitioner was an intern at a Cleveland hospital, he contributed his spare time to a ghetto neighborhood free clinic sponsored by the Students for a Democratic Society. See *infra*, p. 43. Only those traditional safeguards of notice, an opportunity to be heard, and a statement of reasons provide the minimum acceptable protection against such arbitrary or discriminatory action by the Appeal Board.

The Fourth and Ninth Circuits have concurred with petitioner, that a Board must state its reasons and findings when denying an application for conscientious objector status. *United States v. Haughton,* 413 F. 2d 736 (9th Cir. 1969); *United States v. Broyles,* 423 F. 2d 1299 (4th Cir. 1970). The First and Second Circuits' decisions in *United States v. Curry,* 412 F. 2d 1297 (1st Cir. 1969) and *Morico v. United States,* 415 F. 2d 138 (2d Cir. 1969) create a sharp conflict in the circuits which requires resolution by this Court consistent with such prior decisions as *Gonzales* and *Simmons* and with its broader ruling in *Goldberg v. Kelly, supra.*

3. There is no statutory authorization for the summary procedures by which the appeal of petitioner's classification was prosecuted, considered and decided. Nor, indeed, was the State Director's appeal in this case authorized. These conclusions result from the guiding principle that where, as here, the liberties of a citizen are involved, the Court "will construe narrowly all delegated powers that curtail or dilute them." *Kent v. Dulles,* 357 U.S. 116, 129; see also *Gutknecht v. United States,* 396 U.S. 295; *Schneider v. Smith,* 390 U.S.17.

a. The injunction against assuming statutory authority for administrative conduct of questionable constitutional validity is undeniably applicable to an administrative practice which, like that involved here, denies all semblance of procedural fairness. *Greene v. McElroy,* 360 U.S. 474. No such assumption can be made, as the Court has said, unless Congress "specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . .not only to assure that individuals are not deprived of cherished rights" but also to prevent "decisions of great constitutional import and effect [from being] relegated by default to administrators who, under our system of government, are not endowed with authority to decide them" *Id.* at 507.

Under 50 U.S.C. App. §460(b)(3), appeals from local board determinations may be taken to the Appeal Board "in accordance with such rules and regulations as the President may prescribe." This authorization, particularly in the context of an appeal by the State Director is no more explicit authority for denying notice, an opportunity to be heard and statement of reasons and findings than was the similarly broad delegation of power considered in *Greene*. The assumption that summary procedures are authorized is nowhere less acceptable than in this case, where there exists a "strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors. . ." *United States v. Gearey*, 368 F. 2d 144, 150 (2d Cir. 1966).

b. Similarly, the general statutory authority for appeals from Local Board determinations in 50 U.S.C. App. §460(b)(3) should not be read to permit the State Director's appeal in this case.

The limitation on the power to review local board determinations granting conscientious objector status derives from the decision of the Court in *Peters v. Hobby*, 349 U.S. 331 involving an analogous proceeding. Here, as in *Peters*, the individual's interest in finality after a favorable decision is equivalent to a defendant's in a judgment of acquittal. The local board's determination, based on personal observations of the registrant and thorough evaluation of his character and background and rendered by men who represent the registrant's community should be final when favorable to the registrant. Cf. *Peters v. Hobby, supra* at 344-345.

If appeals are to be permitted from favorable determinations, then they should be limited to a situation where the State Director alleges that the local board departed from the governing legal standards or applied these standards improperly. Where, as here, the appeal seeks *de novo* review of the registrant's sincerity, it is unwarranted. The Appeal Board does

not conduct personal interviews or hold any hearings and consequently it should be bound by the Local Board's determination where personal factors are at issue.

3. This Court's decisions in *Oestereich v. Selective Service Board, supra* and *Breen v. Selective Service Local Board No. 16, supra* restate, in the context of a Congressional expression of desire to curtail judicial review, a traditional concept that where one's liberty is challenged by lawless administrative fiat, a forum must be available for redress. The decision below departed from that traditional view and from this Court's construction of §10(b)(3). In *Oestereich, Breen* and *Clark v. Gabriel*, 393 U.S. 256, the Court analyzed the standards for review and found it appropriate in situations in which a board acted in a manner that was "basically lawless". Read together these decisions stand for the proposition that in the extreme case of a board's flouting the law, as exemplified by a "retaliation against the person because of his political views", 393 U.S. at 237, or by "mov[ing] a registrant from a c.o. classification to a I-A and disregarding all the evidence denied him a c.o. classification", *supra* at 260[5] preinduction judicial review was available.

Since no disclosure of Appeal Board rationale was made, one cannot know with certainty what standard was applied by it. However, it is reasonable to speculate that the Board in an undefined fashion treated petitioner's activities in the civil rights movement in general and with the Students for a Democratic Society in particular as the basis for its decision.

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5. Given the details of petitioner's conscientious objector application, and the power pursuant to 32 CFR 1626.24(b) of an appeal board to explore "general information concerning . . . social conditions" beyond the scope of a registrant's file, Chief Judge Lumbard below thought that "the possibility of this latter sort of error is strong in this case." 430 F. 2d 376, 387 fn. 10, *infra*, p. 43.

Whether the approach of the Court is that offered by Justice Douglas for the majority in *Oestereich* or Justice Harlan in concurrence, the result is the same since in addition to the "facially unconstitutional" action by the appeal board, given the finality reflected by the Local Board's order to petitioner to report for induction, there is "no opportunity for protracted delay" and no cause of uncertainty as to classification.

The outstanding notice to report for induction is a complete answer to the court below's refusal to afford judicial review on the ground that this Court's *per curiam* decision in *Boyd v. Clark*, 393 U.S. 316, controls. Unlike *Boyd*, in which the petitioners were in an unsettled position with their respective local boards (not having been ordered to report for induction), petitioner has exhausted all administrative possibilities and is in a position of finality with the Selective Service System.

Unlike *Oestereich* and *Breen* where administrative regulations were held unauthorized as beyond the terms of a specific statute, see *Gutknecht v. United States*, *supra*, petitioner here is confronted with a series of appellate administrative regulations which are unauthorized by statute and flout due process. See *infra* p. 11-13. As Judge Lumbard suggested below:

> "The difference, which I do not deem significant, is that in *Oestereich* the conflict posed was between a board regulation—the delinquency provision—and a statutory command, the ministerial exemption. Here the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an *a fortiori* case for preinduction review." 434 F. 2d at 382.

4. Judge Hays has posed an important question of federal law which has been presented to this Court on numerous occasions in recent years and never squarely reached, i.e.,

whether 28 U.S.C. §1331(a) can serve as a predicate to jurisdiction in a case of constitutional dimension in which a plaintiff either does not allege damages in a monetary amount or if he does cannot prove $10,000 in monetary damage.[6]

There is considerable confusion engendered by the failure to resolve the issue. In some cases this Court and lower federal courts have heard and decided the merits of cases of constitutional proportion without inquiring whether the jurisdictional amount was satisfied. *Aptheker v. Secretary of State*, 378 U.S. 500 (1965) (right to passport issuance); *Schneider v. Rusk*, 377 U.S. 163 (1964) (right to citizenship); *A Quaker Action Group v. Hickel*, 421 F. 2d 1111 (D.C. Cir. 1969) (injunction against picketing); *Thompson v. Clifford*, 408 F. 2d 154, (D.C. Cir. 1968) (right to burial in military cemetery of a deceased Communist). On other occasions, federal courts have acknowledged the requirement and glossed over it as the Second Circuit did in *Breen, supra* at 643 fn. 1, in which that court, referring to the jurisdictional amount, stated "The government has made no point about this nor shall we." Increasingly, United States attorneys raise the issue as a bar to jurisdiction and it becomes the basis for decision. *Oestereich, supra* at 239.[7]

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6. Petitioner acknowledges the reasonable dual interests of federalism to be (a) insuring that federal courts will not intrude beyond the "rightful independence of state governments" by adjudicating controversies that should be determined by state courts. *Healy v. Ratta*, 292 U.S. 263, 269-70 (1934) and (b) keeping "petty" cases out of the federal system. S. Rep. No. 1830, 85 Cong. 2d Sess. 1958, 1958 U.S. Code Cong. Adm. News. PP. 3099-3101, quoted in *Giancana v. Johnson*, 375 F. 2d 366, 368-369 fn.7 (7th Cir. 1964).

7. A variety of eminent federal judges have reflected substantial confusion over the application, if any, of §1331(a) to cases such as petitioner's. *Wolff v. Selective Service*, 372 F. 2d 817, 826 (2d Cir. 1967) (Senior Judge Medina); *Giancana v. Johnson*, 335 F. 2d 366, 371 (7th Cir. 1964), *cert. denied* 379 U.S. 1001 (dissenting opinion Judge Swygert); *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968) (Dissenting opinion of Judge Edelstein), *aff'd other grounds*, 393 U.S. 318; *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969) (Judge Pettine); *Berk v. Laird*, 429 F. 2d

As Chief Judge Lumbard indicated in dissent below, after acknowledging that petitioner would in all likelihood meet the jurisdictional requirement

> "... if the $10,000 requirement of Section 1331 closes the doors of the federal courts, petitioners complaining of unconstitutional acts by the Selective Service System will have nowhere to go for relief." 430 F. 2d 376, 384,

and See Comment, *Draft Reclassifications for Political Demonstrators—Jurisdictional Amounts in Suits Against Federal Officials,* 53 Cornell L. Quarterly 916 (1968). Put another way, if §1331 may be interposed as a bar to jurisdiction in cases in which allegations of deprivation of fundamental liberties are made, federal officials who have engaged in illegal conduct are immune from judicial sanction because no forum is available.[8]

If the §1331 requirement remains, serious constitutional questions are presented, questions which have been increasingly acknowledged as troublesome by federal judges. *Boyd v. Clark, supra* (Edelstein); *Murray v. Vaughn, supra* (Pettine). Article III of the federal Constitution invests judicial power of the

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302 (2d Cir. 1970); *Moylan v. Laird,* 305 F. Supp. 551, 553 (D.R.I. 1969) (Judge Pettine); *Walsh v. Local Board No. 10,* 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969) (Judge MacMahon).

8. The issue of retention of a 19th century property qualification is an anachronism which has been the subject of a report by the American Law Institute which expresses the view that

> "... the stated requirement of an amount in controversy in fact has relatively little impact on the volume of federal question litigation. The few cases there are, however, that must satisfy the 1331 requirement are likely to involve matters *particularly deserving of a federal forum.* e.g. *Giancana v. Johnson* ... Cases in which the plaintiff claims violation of his constitutional rights by action of a federal official warrant federal cognizance without the need of demonstrating that the requisite amount is in controversy." ALI Study of the Division of Jurisdiction Between State and Federal Courts, 172 (1969), *Emphasis added.*

United States in the judiciary. Article III, Section 2 extends the judicial power to all cases which arise under the Constitution and laws of the United States. In terms there is no reference in Article III to an amount in controversy.

Petitioner has alleged and by the motion to dismiss respondent has admitted that respondent has abridged petitioner's constitutional right to due process pursuant to the Fifth Amendment. If petitioner is without any judicial forum to litigate the merits of his case apart from the federal courts, the question must then be faced whether Congress by enacting §1331 can prevent the judicial power from vesting anywhere by conditioning vindication of constitutional rights on demonstrable economic loss. The concurring opinion below effectively answered that question in the affirmative. If the opinion of Judge Hays controls, then §1331 is in conflict with the Constitution.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the court below.

Respectfully submitted,

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December 18, 1970

APPENDIX

UNITED STATES DISTRICT COURT

Southern District of New York

Memorandum—69 Civ. 431

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants.

TYLER, D.J.

Oliver Fein moves to preliminarily enjoin his local draft board and the appellate hierarchy of the selective service system from ordering him to report for induction into the Armed Forces of the United States. He moves also for summary judgment declaring that Section 460(a)(2) of the Military Selective Service Act, 50 App. U.S.C. §460(a)(2) (1968) and certain selective service regulations, 32 C.F.R. 1626.1 and 1627.1(a) (b), violate the due process clause of the Fifth Amendment, both on their face and as applied to him.

The registrant, a medical doctor currently practicing in the field of community and public health in Cleveland, Ohio, graduated from Swarthmore College in June, 1962, and Western

Reserve University Medical School in June, 1967. He held a II-S (student) classification for the duration of his academic career, and upon graduation from medical school, he was granted a II-A classification (work in the national interest) during his one year internship in pediatrics at Cleveland Metropolitan General Hospital. In September, 1967, while an intern, plaintiff sought conscientious objector status from his draft board, Local Board No. 7, located in Yonkers, New York. That classification was denied him and he remained II-A. In February, 1968, upon being notified by his local board that he had been reclassified I-A, plaintiff again sought and then received conscientious objector status (I-O).

About two weeks after the local board's action, plaintiff's I-O classification was appealed by the State Selective Service Director to the Appeal Board for the Southern District of New York. Plaintiff at once sought from the local board and the appeal board a statement of reasons for the appeal but received, in his words, "no pertinent response". On June 20, 1968, the Appeal Board for the Southern District of New York overturned the action of the local board and reclassified plaintiff I-A by a vote of 4-0. No reasons for the action of the appeal board were furnished to plaintiff. On September 16, 1968, the National Selective Service Director, at the prompting of plaintiff, appealed the action of the district appeal board to the Presidential Appeal Board, with notice to plaintiff. Prior to the decision of the Presidential Appeal Board, the State Selective Service Director, in response to a request by plaintiff, informed him by letter of October 31, 1968, that in his opinion plaintiff did not qualify for deferment as a conscientious objector and that his decision to appeal the local board's action was based upon the information contained in plaintiff's selective service file. On November 26, 1968, the Presidential Appeal Board, without a statement of reasons, upheld the action of the district appeal board, thereby retaining plaintiff in the I-A classification.

Plaintiff alleges here that Section 460(a)(2) of the Military Selective Service Act of 1967, 50 App. U.S.C. §460(a)(2) and 32 C.F.R. §§1626.1 and 1627.1 are unconstitutional in that: (1) they do not require notification to a registrant of the reasons for appeal by the State Selective Service Director; (2) they do not require a statement of reasons for a decision by the Selective Service District Appeal Board or by the Presidential Appeal Board; and (3) they do not offer a registrant the opportunity to present evidence at either the intermediate or the final appeal level. In short, plaintiff finds the statutory scheme for appeals, as implemented by the subject regulations, unconstitutional because it makes no provision for a statement of reasons for the actions of the various bodies and allows no opportunity to present evidence.

I do not reach the merits of these contentions in this action. Plaintiff's complaint is beset by various obstacles, not the least of which is the question of whether he can show jurisdiction of this court to hear this suit. Assuming, *arguendo*, that he can, he must also show that this court is not barred from exercising that jurisdiction by Section 10(b)(3) of the Military Selective Service Act of 1967, 50 App. U.S.C. §460 (b)(3). I conclude that he cannot make this latter showing.

Section 10(b)(3) prohibits pre-induction judicial review "of the classification or processing of any registrant," such review being limited to a defense in a criminal prosecution or to habeas corpus after induction:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in any form:

> *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Without elaborate analysis, Section 10(b)(3), when read in light of the Supreme Court decisions in *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968), and *Clark v. Gabriel*, 393 U.S. 256 (1968), bars pre-induction review where plaintiff seeks to challenge a determination of fact, or an exercise of judgment or discretion by the local board, or, in this case, the appellate boards. The point is well made in *Clark v. Gabriel, supra*, where the Court draws a distinction between *Oestereich*, where the Court held that pre-induction judicial review would not be barred by Section 10(b)(3), and *Clark*, where the Court held that such review would be barred:

> "In *Oestereich* the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being sustained by the local board.
>
> Here the Board has exercised its statutory discretion to pass on a particular request for classification, 'evaluating evidence and. . .determining whether a claimed exemption is deserved'. *Oestereich v. Selective Service Bd.*, *ante*, at 238." 393 U.S. at 258.

Thus, it can be reasoned that plaintiff does not seek to challenge such a discretionary determination. Rather, he

challenges, on a strict legal or constitutional basis, the selective service appellate scheme as provided in the statute and relevant regulations. Consequently, my understanding, summarized above, of *Oestereich* and *Clark* at first blush would seem to justify the conclusion that plaintiff's action is not barred by Section 10(b)(3). A more recent Supreme Court case, however, vitiates this simple rationale.

In *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), *aff'd.* 393 U.S. 316 (1969), four selective service registrants challenged the constitutionality of the student deferments provided in Section 6(h)(1) of the Military Selective Service Act of 1967, 50 App. U.S.C. §456(h)(1) (1968) on grounds that the student deferments (1) discriminate against persons who are economically unable to attend college and (2) are arbitrary and bear no reasonable relationship to the purpose of the Act. The registrants, all classified I-A and alleging that they were unable to secure student deferments solely because they lacked the financial means to attend college, sought a declaratory judgment that the Act was unconstitutional as applied to them and injunctive relief. A three-judge panel in this district dismissed the action for lack of a justiciable controversy and for want of jurisdiction. This court reasoned that because the registrants had never been called for induction and that there had been no showing that the amount in controversy exceeded $10,000, as required by 28 U.S.C. §1331 (1964), the claim was premature.

On direct appeal, the Supreme Court ruled briefly as follows:

> "Per Curiam
>
> The judgment is affirmed, *Clark v. Gabriel, ante,* p. 256, without reaching the jurisdictional question raised under 28 U.S.C. §1331."

Confessing uncertainty as to the full meaning of the Court's cryptic citation of *Clark v. Gabriel* as the sole ground for affirmance in *Boyd v. Clark,* I nevertheless conclude that the

latter case is dispositive of this case. Specifically, I am constrained to interpret the *per curiam* statement of the Supreme Court as an indication of its conclusion that the operative facts therein placed *Boyd v. Clark* in the class of pre-induction selective service suits barred by Section 10(b)(3) because they do not fit the exceptions carved out in *Oestereich*. As in *Boyd*, plaintiff here raises constitutional objections to a regulatory scheme administered by the selective service system. To be sure, certain facts and circumstances of *Boyd* are different in some respects from those in the case at bar; nevertheless, these differences, in my opinion, are insufficient to permit me to "distinquish" *Boyd* and refuse to apply its holding here.

Parenthetically, although neither plaintiff nor defendants have raised the point, this action could be interpreted as a suit to enjoin the operation of an act of Congress on grounds that it is repugnant to the federal Constitution. As such, it might provide the basis for a motion to empanel a three-judge district court under 28 U.S.C. § 2282 (1964). A district judge, however, is entitled to dismiss such a complaint where the unsoundness of the constitutional question "so clearly results from the previous decisions of this [the Supreme] Court as to foreclose the subject. . . ." *Ex parte Poresky*, 290 U.S. 30, 31 (1933); *accord, California Water Service v. City of Redding*, 304 U.S. 252 (1938); see, also, the opinion of this court in *Green v. Board of Elections*, 259 F. Supp. 290 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 445 (1967), *cert. denied*, 389 U.S. 1048 (1968). Here, *Boyd v. Clark*, *supra*, effectively forecloses the jurisdictional issue.

Accordingly, plaintiff's motions are denied, and defendants' motion to dismiss the complaint is granted.

June 10, 1969.

U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 626—September Term, 1969.

(Argued March 24, 1970 Decided July 23, 1970.)

Docket No. 33737

OLIVER T. FEIN,

Plaintiff-Appellant,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.**

Appeal from an order by the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* dismissing an action by a selective service registrant, seeking an injunction against his induction and a declaration that his reclassification into I-A by the appeal board after his local board had classified him I-O was null and void. Affirmed.

* Of the District of Connecticut, sitting by designation.

MICHAEL B. STANDARD, New York, N. Y. (Rabinowitz, Boudin & Standard, of counsel), *for Plaintiff-Appellant.*

PETER R. DEFILIPPI, Assistant United States Attorney (Whitney North Seymour, JR., United States Attorney for the Southern District of New York, Patricia M. Hynes, Assistant United States Attorney, of counsel), *for Defendants-Appellees.*

BLUMENFELD, *District Judge*:

Appellant is a doctor of medicine. While obtaining his education, he was classified II-S (student deferment), and upon graduation and while serving as an intern, he was classified II-A (occupational deferment). In September 1967, while still II-A, he wrote to the local board stating his conscientious objection to war and requesting the appropriate forms. He filed an application for a I-O (conscientious objector) classification and appeared before the local board. Finding that Fein did not qualify for a I-O "at that time," the board retained him in his II-A status. In February 1968 he was classified I-A by the local board, but following a personal appearance on May 22, 1968, that board found that he qualified as a conscientious objector and classified him I-O.

About two weeks later, this classification was appealed to the state appeal board by the State Director of Selective Service. 32 C.F.R. §1626.1 (1951). Appellant sought from both the local and appeal boards a statement of reasons for the appeal, notification of the standards to be applied on appeal, advice as to whether additional information outside his file was to be presented, and an opportunity to

rebut findings by the appeal board as to the appropriateness of his classification. He received no pertinent response before the decision of the appeal board was rendered. On June 20, 1968, the appeal board, by a vote of 4-0, reversed the local board and reinstated appellant in class I-A. It gave no reason for that action.

On September 16, 1968, the National Selective Service Director, at Fein's request (no right of appeal by the registrant being available from an unanimous vote of the appeal board, 32 C.F.R. §1627.3 (1967)), appealed the decision to the Presidential Appeal Board. 32 C.F.R. §1627.1(a) (1948). Meanwhile, on October 31, 1968, the state director wrote to Fein stating that in his opinion Fein did not qualify as a conscientious objector and that his decision to appeal the local board's I-O classification was based on information in Fein's selective service file. On November 26, 1968, the Presidential Board, without a statement of reasons, upheld the appeal board.

The appellant then brought this action in the district court seeking an injunction against his induction into the armed forces and a judgment that his reclassification from I-O to I-A was null and void.

Jurisdiction was predicated on 28 U.S.C. §§1331, 1343, 1361, 1391 and 2201, and on an allegation that the matter in controversy exceeded the value of $10,000 exclusive of interest and costs.[1]

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1 The Supreme Court has not yet ruled on the jurisdictional basis for an action by a selective service registrant seeking pre-induction review of his classification, although it has entertained several such cases on the merits. *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233, 239 (1968) (where the remand stated in part: "petitioner must have the opportunity . . . to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. §1331"); *Clark* v. *Gabriel*, 393 U.S. 256, 259 (1968) (where the Court granted leave to proceed *in forma pauperis*); *Boyd* v. *Clark*, 393 U.S. 316 (1969) (*affirming* 287 F. Supp. 561 (S.D.N.Y. 1968) "without reaching the jurisdictional question raised under 28

The plaintiff claimed that his reclassification from I-O to I-A violated his fifth amendment right to due process in that the regulations contained no provisions requiring notice to the registrant of the reasons for appeal by the State Selective Service Director, nor for a statement of the bases of decision by the respective appeal boards and did not provide for an opportunity to present evidence to rebut the state director's appeal.

Deciding that pre-induction judicial review of the plaintiff's classification was explicitly barred by 50 U.S.C. App. §460(b)(3) (§10(b)(3) of the Selective Service Act of 1967), Judge Tyler in a well-considered opinion denied the plaintiff's motion for summary judgment and dismissed the complaint for lack of subject matter jurisdiction. We agree.

Congress amended §10(b)(3) in 1967 to add an explicit bar to judicial review

> "of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . ."

in answer to *Wolff* v. *Selective Serv. Bd.*, 372 F.2d 817 (2d Cir. 1967), which had permitted pre-induction judicial review of local board reclassifications of two II-S registrants into class I-A because of their participation in a demonstration protesting American involvement in Vietnam. Within a year after the amendment, a challenge to its scope reached the Supreme Court in *Oestereich* v. *Selective Serv. Bd.*, 393

U.S.C. §1331"). Peremptory dismissal is seldom ordered unless it appears to a legal certainty that the claim is for less than the jurisdictional amount. *St. Paul Mercury Indemn. Co.* v. *Red Cab Co.*, 303 U.S. 283, 290 (1938). In this case, the court below did not reach the issue.

U.S. 233 (1968). Oestereich was a divinity student admittedly entitled to a statutory exemption from military service under §6(g) of the Act, 50 U.S.C. App. §456(g) (1967). His draft board declared that he was a delinquent and simultaneously reclassified him as I-A for having turned in his draft card in protest to American participation in the Vietnam war. Finding that the board had acted in a "blatantly lawless manner" by depriving him of his "statutory right" to an exemption, *id.* at 238-39, the Court held that to read the amendment literally to deny pre-induction review in such a case would be "to construe the Act with unnecessary harshness." *Id.* at 238.

Having departed to that extent from a literal reading of §10(b)(3),[2] the Court undertook to elaborate its *Oestereich* holding through its opinion in *Clark* v. *Gabriel,* 393 U.S. 256 (1968), decided the same day. *Clark* v. *Gabriel* held that §10(b)(3) of the Act barred pre-induction review of the denial of a claim to classification as a conscientious objector. The Court explained *Oestereich* as a case where the board action was "without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption." *Id.* at 258. Sharply distinguishing that situation[3] from the one before it, the Court said:

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2 The Court in *Oestereich* also noted that while §10(b)(3) on its face purports "to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent." *Id.* at 238.

3 *Breen* v. *Selective Serv. Bd.,* 396 U.S. 460 (1970), was held indistinguishable from *Oestereich.* The Court found that because there was no lawful basis for the use of delinquency regulations in that case to warrant the revocation of a statutorily mandated student deferment, §10(b)(3) did not preclude pre-induction review.

> "Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment." *Id.*

And, to avoid any risk of being misunderstood, Mr. Justice Douglas, who wrote for the majority in *Oestereich,* concurred in *Gabriel,* and after noting some hypothetical examples of lawless board action, went on to say: "[I]t takes the extreme case where the Board can be said to flout the law, as it did in Oestereich [393 U.S. at 233], to warrant pre-induction review of its actions." *Id.* at 260.

These two decisions by the Court convincingly dispel the notion that pre-induction review may be obtained simply by framing issues in terms of purely legal questions divorced from their factual context,[4] a tour de force attempted by the appellant in this case.

The limitation of pre-induction review to cases of "blatantly lawless" action by the board gained further confirmation in *Boyd* v. *Clark,* 393 U.S. 316 (1969), which affirmed a denial of pre-induction review to registrants classified I-A, in a one-sentence per curiam opinion: "The judgment is affirmed, Clark v. Gabriel [393 U.S. at 256], without reaching the jurisdictional question raised under 28 U.S.C. §1331." In *Boyd,* the plaintiffs challenged their classification on several legal grounds without in any way contesting the discretionary or fact-finding aspects of the local board's decision to classify them I-A. *See* opinion below, *Boyd* v. *Clark,* 287 F. Supp. 561 (S.D.N.Y. 1968). Indeed, among

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4 The government's Jurisdictional Statement in *Gabriel* shows that Gabriel raised several constitutional issues which could have been passed on without inquiry into findings of fact or exercise of discretion by the local board. See *Breen* v. *Selective Serv. Bd.,* 406 F.2d 636, 639 (2d Cir. 1969), *rev'd on other grounds,* 396 U.S. 460 (1970).

the constitutional claims asserted in *Boyd* were some which had a source in common with those asserted by the appellant here: the due process clause of the fifth amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

Although the law of new cases may never be open and shut,[5] we have been furnished with sufficient guidance to hold that an appeal board does not flout the law in a blatantly lawless manner merely because the President has not provided certain procedural safeguards to govern the Selective Service System's administrative tribunals in determining whether a registrant is a genuine conscientious objector not "subject" to combatant training or service under §6(j) of the Act, 50 U.S.C. App. §456(j) (1967). See *Falbo* v. *United States*, 320 U.S. 549, 554 (1944). Cf. *Estep* v. *United States*, 327 U.S. 114 (1946).

The appellant had no clear statutory right to a I-O classification. Allegations of constitutional infirmities in the classification procedures did not bring this case within any exception to the bar of §10(b)(3).

Accordingly, the order of Judge Tyler dismissing the complaint is affirmed.

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5 The view that §10(b)(3)'s proscription against pre-induction review imposes such a risk of severe penalty as to "raise serious constitutional problems" in challenges to the administrative procedure of classification itself without accompanying challenges to matters within the local board's discretion was suggested by Mr. Justice Harlan in his concurring opinion in *Oestereich*, 393 U.S. at 243, as a basis for a broader holding than that adopted by the majority of the Court. That view was implicitly rejected without discussion in *Boyd* v. *Clark*, 393 U.S. at 316.

Nor was the majority in *Breen* yet ready to adopt his view, again expressed by way of a concurring opinion in that case, that pre-induction review should not be limited to cases where there is a deprivation of a clear statutory right to a certain classification. Without reweighing all the values, the present rule does give some recognition to the purpose of Congress to limit pre-induction review.

HAYS, *Circuit Judge* (concurring):

I concur in Judge Blumenfeld's opinion in regard to §10(b)(3) but would also rely upon failure to establish the jurisdictional amount under §1331 as a ground for affirming the trial court's dismissal of the action. See *Boyd* v. *Clark*, 287 F. Supp. 561 (three judge court) (S.D.N.Y. 1968), aff'd on other grounds 393 U.S. 316 (1968).

LUMBARD, *Chief Judge* (dissenting):

I dissent.

After lengthy correspondence, two personal interviews, and extensive personal testimonials, Dr. Fein was granted conscientious objector status by his local board. The State Director, without stating any grounds, appealed the classification, and the State Appeal Board reversed and reclassified Fein I-A. The State Appeal Board gave no reasons for its decision, it did not permit Fein to submit a statement in support of his classification, and it may not even have relied solely on information in the file. In this suit to enjoin his induction Fein argues that such treatment does not meet minimum standards of due process, as developed by the federal courts over the last three decades. See, e.g., *United States* v. *Morgan*, 304 U.S. 1, 18 (1938). I agree.

The majority, however, holds that, as interpreted by the Supreme Court, Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. §460(a)(2), bars the preinduction review sought by Dr. Fein. I cannot accept my brothers' readings of the relevant Supreme Court decisions. To me, Fein's claim is not barred by the literal words of Section 10(b)(3), and I think the exception to that section recognized by the court in *Oestereich* v. *Selective Service*, 393 U.S. 233 (1969) reaches this case as both

here and in *Oestereich* a presidental regulation must fall to a higher command. I would also hold that the $10,000 jurisdiction amount required by 28 U.S.C. §1331 is satisfied by Fein's allegations.

I. *Section 10(b)(3)*

The language of Section 10(b)(3) prescribes preinduction review "of the classification or processing of any registrant." Concurring in *Oestereich*, Mr. Justice Harlan gave a gloss to those words which I accept. He read "classification or processing" to encompass "the numerous discretionary, factual and mixed law-fact determinations which a Selective Service Board must make prior to issuing an order to report for induction." 393 U.S. at 240. At issue in this case, however, are procedural rules governing appeals to the State and Presidential Appeal Boards, and I do not read Section 10(b)(3) as explicitly barring a claim that the procedures involved are invalid under the due process clause. At stake is not a board determination "processing or classifying" the registrant, but the procedures underlying the way such determinations are made.[1]

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1 This interpretation of the section is reinforced by its legislative history. In his *Oestereich* concurrence, Mr. Justice Harlan isolated two major considerations behind Congress' decision to defer judicial review of decisions involving classification or processing. First, because these determinations are of a highly discretionary nature, judicial review—although narrow—still would take considerable time, as often the courts must examine board records, hear testimony, and resolve controversies on a sizeable record. Second, it can be presumed that, with the full opportunity to be heard afforded by the system, a registrant's board has classified him properly, in accordance with the applicable statutes and regulations. See 393 U.S. at 240-41.

These factors, as Mr. Justice Harlan points out, are significantly altered when the registrant challenges a procedure used by the system. This sort of claim does not require the court to review discretionary determinations, so there is no protracted delay; usually, the case can be tried on a stipulated set of facts. Further, there can be no presumption of regularity, since the issues raised are beyond the system's

My brothers argue, however, that this interpretation of Section 10(b)(3) is foreclosed by the opinions of the court in *Oestereich, Breen* v. *Local Board No. 10,* 396 U.S. 460 (1970), and *Clark* v. *Gabriel,* 393 U.S. 256 (1968). A reading of these cases leads me to the opposite conclusion, as I find the claim of Board "lawlessness" Fein raises to be substantially similar to the situations presented in *Oestereich* and *Breen.*

Oestereich was enrolled as a divinity student preparing for the ministry when he turned in his draft card to protest the United States' participation in the war in Vietnam. Shortly thereafter, his local board declared him delinqent for failure to have his registration certificate in his possession and to keep the board informed of his local status. The Board then reclassified him I-A and, after an unsuccessful appeal, he was ordered to report. At that point, he brought suit to restrain his induction. *Breen* is quite similar, save that the petitioner was a college student with a II-S deferment when he was declared delinquent and reclassified I-A.

In *Oestereich,* the court framed the question presented as whether Section 10(b)(3) barred a preinduction challenge to a reclassification based on the delinquency regulation. The court held, first, that as there was no statutory authorization for the Board to revoke the statutorily-based ministerial exemption, its action was "basically lawless"; second, that Section 10(b)(3)'s restriction on preinduction re-

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competence, perhaps even its jurisdiction. On my reading of the legislative history, Congress passed Section 10(b)(3) to meet a specific problem: the vexatious delays caused by preinduction review of certain kinds of claims, see *Clark* v. *Gabriel,* 393 U.S. 256, 258-59 (1968). Had Congress wanted to prevent all registrants from seeking the aid of the federal courts on any matter involving the Selective Service System before induction, it would have used general language, not a specific prohibition covering only two areas.

view cannot, if it be constitutional, be read literally as a literal reading would command that the writ of habeas corpus be suspended; and third, that an exception must be implied to permit review of board actions which revoke a statutory right on the basis of a power conferred only by Selective Service regulations. *Breen* follows *Oestereich* closely, the only difference being that *Breen* had a statutory deferment rather than an exemption.

Clark v. *Gabriel*, 393 U.S. 256 (1968), decided the same day as *Oestereich*, confirmed Mr. Justice Douglas' statement in *Oestereich* that "[o]ur construction leaves §10 (b)(3) unimpaired in the normal operation of the Act." 393 U.S. at 238. Gabriel sought preinduction review of the board's refusal to grant him conscientious objector status. In holding that Section 10(b)(3) barred the suit, the court per curiam in a unanimous opinion explained *Oestereich* as

> "In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student was by statute, unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which the appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.' 50 U.S.C. App. §456(j) (1964 ed. Supp. III)."

393 U.S. at 258. To me, Fein's claim falls squarely within the *Oestereich* exception.

In *Oestereich, Breen* and this case, the registrant challenges a procedure unauthorized by statute, while claiming that the regulation deprives him of a right based on higher authority.[2] The difference, which I do not deem significant, is that in *Oestereich* the conflict posed was between a board regulation—the delinquency provision—and a statutory command, the ministerial exemption. Here, the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an a fortiori case for preinduction review. In neither *Oestereich, Breen,* nor this case are there any discretionary determinations of the system involved, nor are there any factual inquiries required. See *Bucher* v. *Selective Service System,* 421 F.2d 24, 27 (3 Cir. 1970) ("The Section bars pre-induction review only where there is a challenge to the System's resolution of factual questions in the classification or processing of a draft registrant"). In all these cases, the System acted in reliance on a purportedly valid regulation, in such a way as to deny the registrant a firmly established right. Since I would find that the *Oestereich* exception reaches Fein's case, I would hold it not barred by Section 10(b)(3).

If the *Oestereich* exception is to be read narrowly, so as to turn "on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification," *Breen* v. *Selective Service Bd.,* 396 U.S. 460, 468 (1970) (Harlan, *J.,* concurring), I would recognize a third

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2 The Selective Service Acts themselves are silent about what procedures are to be followed on appeal; the only instructions are that appeals are authorized and are to be taken "in accordance with such rules and regulations as the President may prescribe." 50 U.S.C. App. §460 (b)(3). On the effect of such a delegation generally, see *Gutknecht* v. *United States,* 396 U.S. 295 (1970).

exception into the section. This exception would permit preinduction review of claims, such as Fein's, that "the very statutes or regulations which the board administers are "facially invalid." *Oestereich* v. *Selective Service System*, 393 U.S. at 240 (Harlan, *J.*, concurring). In *Oestereich* the court showed itself willing creatively to construe Section 10(b)(3); I think that the facts of this case require another exercise of construction here.

I do not believe that Congress, even if it so intended, could by a provision such as Section 10(b)(3) deprive the federal courts of their power to hear allegations that a governmental agency has denied a citizen procedural due process before the registrant is in custody. See 394 U.S. at 243 n. 6. My reading of the section and of its legislative history convinces me that Congress had no such intention. Of course, it is our duty to construe federal statutes, wherever possible, to sustain their constitutionality.[3] So, faced with the alternatives of a difficult inquiry into the section's constitutionality or a saving construction consistent with Congress' intend and the statute's clear wording, I would recognize another exception to the section to permit claims that an authorizing statute or board regulation is invalid because it is contrary to the Constitution.

My brothers, however, would read the Supreme Court's one sentence, per curiam affirmance in *Boyd* v. *Clark*, 393 U.S. 316 (1969), on the basis of *Clark* v. *Gabriel*, to fore-

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3 See, e.g., *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932):

> "When the validity of an Act of Congress is drawn into question, and even if a serious doubt is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided."

See also *United States* v. *Seeger*, 380 U.S. 163, 188 (1965) (Douglas, *J.*, concurring); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, *J.*, concurring).

close this exception. In my view, *Boyd* is completely distinguishable. The petitioners in *Boyd,* four college-age youths who alleged they could not afford to attend college, sought to challenge the constitutionality of student deferments on equal protection and due process grounds. Without reaching the effects of Section 10(b)(3), the three-judge district court dismissed on the ground that the case was not ripe for adjudication since none of the petitioners had yet been called for induction. 287 F. Supp. 561 (S.D.N.Y. 1968).[4]

The reasons for the rule are sound. Since the registrant may never be called, the rule serves to protect the system "from becoming entangled in litigation which may be unnecessary." *Boyd* v. *Clark,* 287 F. Supp. at 564. Although this rule predates Section 10(b)(3), Congress obviously intended that it be codified therein. See Senate Rpt. No. 209, 90th Cong., 1st Sess. (1967), 1967 U. S. Code & Admin. News 1308; *National Student Ass'n* v. *Hershey,* 412 F.2d 1103, 1107 (D.C. Cir. 1969).

In terms of *Clark* v. *Gabriel* petitioners in *Boyd* stood vis-a-vis their local boards in an unsettled position, as their boards might have to make several discretionary decisions, involving "a determination of fact and an exercise of judgment," *Clark* v. *Gabriel,* 393 U.S. at 25[illegible], before issuing orders to report. For example, the Board might be asked to consider new requests for exemptions or deferments, which of course involve discretion. Even determining the order of call is heavily tinged with discretion, as the local board has extensive powers to alter the order as between registrants with I-A status. See 32 C.F.R. §§1631.7, 1632.2;

4 As an alternative grounds for dismissing the action, the court held that the jurisdictional amount requirement of 28 U.S.C. §1331 had not been met. In affirming, the Supreme Court specifically avoided this question. See part II *infra.*

United States v. *Weintraub*, slip opinion 3421 (2 Cir., June 23, 1970); *Green* v. *Local Board No. 87*, 419 F.2d 813 (8 Cir. 1970).

In affirming *Boyd* on the basis of *Clark* v. *Gabriel*, it seems to me that the court looked not to the nature of the issue presented—which, like Fein's claim, was solely a question of law based on a constitutional challenge—but to the fact that petitioners there had not reached a position of finality within the system. To allow suits before a notice of induction is received would create exactly the sort of "'litigious interruptions of procedures to provide necessary military manpower' which Congress sought to prevent when it enacted §10(b)(3)," *Clark* v. *Gabriel*, 393 U.S. at 255-256 (quoting Sen. Russell). As Fein has been ordered to report, *Boyd* v. *Clark* has no relevance to this case.

II. *Jurisdictional Amount*

Having found that Fein's action was barred by Section 10(b)(3), neither Judge Blumenfeld nor the district court reached the question of whether Fein's allegation that more than $10,000 was in controversy in the present action satisfied the requirements of 28 U.S.C. §1331 (1964). My brother Hays, however, advances jurisdictional amount as a second ground for affirming the judgment below, and with this I disagree.

Judge Hays, arguing from the position he expressed in his opinion in *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), begins with the proposition that the amount in controversy must be reasonably capable of monetary valuation. He then would find the jurisdictional amount here unsatisfied even though Fein was never allowed to prove his allegation, so his second proposition must be that because the value of the rights denied is inherently incapable

of valuation, a registrant can never satisfy Section 1331. Any such per se rule, however, has recently been rejected by this court. In *Berk* v. *Laird,* slip op. 3379, 3385 (June 19, 1970), we held that a soldier who alleges that he is being unconstitutionally ordered into a war zone has met the requirements of Section 1331, since the allegedly unconstitutional action of the government might lead directly to his suffering serious injury or death.

Berk demonstrates that when traversing a jurisdictional allegation, the defendant has a heavy burden. Moreover, the Supreme Court has made it clear that

> "The rule governing dismissal for want of jurisdiction in cases brought in the federal courts is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

St. Paul Mercury Indemnity Co. v. *Red Cab Co.,* 303 U.S. 283, 288 (1938). Although Fein seeks an injunction, not money damages, the same rule applies, with the inquiry looking to "the value of the right to be protected or the extent of the injury to be prevented." C. Wright, Federal Courts, §34, at 116 (2d ed. 1970). For all that appears at this stage, Fein's allegation may rest on a good faith belief that service will result in monetary loss: he may be deprived of several years lucrative private practice or an opportunity for further, specialized training which will permit him to earn more later in his career. In the absence of bad faith or a legal certainty that the allegation is groundless, we must credit the claim. Fein certainly made his al-

legation in good faith, and in light of *Berk* v. *Laird* it cannot be said that as a "legal certainty" the dollar value of what he will lose if illegally drafted is not at least $10,000.

Further, I think that we are required to give the most liberal possible readings to jurisdictional allegations in cases such as this. See *Murray* v. *Vaughn*, 300 F. Supp. 688, 694 (D. R.I. 1969); *Moylan* v. *Laird*, 305 F. Supp. 551, 553 (D. R.I. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969). For if the $10,000 requirement of Section 1331 closes the doors of the federal courts, petitioners complaining of unconstitutional acts by the Selective Service System will have nowhere to go for relief. Mandamus under Section 1361 is rarely available,[5] the Selective Service System itself has neither the competence nor the power to pass on the constitutionality of procedures mandated by presidential regulations, and in this context, the concurrent jurisdiction of state courts is highly questionable. See Comment, Draft Reclassifications for Political Demonstrators—Jurisdictional Amounts in Suits Against Federal Officers, 53 Corn. L.Q. 916, 926-929 (1968).

Since Fein clearly can sustain his jurisdictional allegation, I need not consider the case of a poor man who stands to lose nothing but his most precious personal liberties if the unconstitutional actions of the federal government are beyond the reach of the courts. But if that case ever comes before us, I have grave doubts that the old rule requiring the claimed deprivation be capable of monetary valuation would long endure.

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5 Compare *Feliciano* v. *Laird*, —— F.2d —— (2 Cir., April 16, 1970), with *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2 Cir. 1968), cert. denied, 394 U.S. 929 (1969).

III. *The Merits*

Under the regulations, the State Director may appeal any classification of the local board at any time. Section 1626.1. He may attach to his appeal a statement specifying the grounds for his appeal. Section 1626.12.[6] In reviewing the appeal, the Appeal Board has the following warrant:

> In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:
>
> (1) Information contained in the record received from the local board.
>
> (2) General information concerning economic, industrial, and social conditions.

Section 1626.24(b). Apparently, it also may consider the information contained in the appellant's statement. If he deems the matter to be "in the national interest or necessary to avoid an injustice," the State Director may appeal any determination of the Appeal Board to the Presidential Appeal Board. Section 1627.1.[7]

Fein claims these procedures violate due process in that (1) they do not require that the registrant be notified of

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6 Section 1626.12 provides that:

> "The person appealing may attach to his appeal a statement specifying the matters in which he believes the board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

7 The regulations provide that if there has been at least one dissent at the state level, the registrant himself may appeal. Section 1627.3. Here, however, the state board had reversed Fein's classification unanimously, and the State Director took an appeal for the registrant.

the reasons for appeal advanced by the State Director; (2) no statement of the reasons for the Appeal Board's decision is required; and (3) the registrant-appellee is given no chance to submit evidence, information or arguments to the Appeals Board.

Fein's first claim—that when the State Director, as appellant, chooses to exercise his right under Section 1626.12 to submit a statement, the registrant must be given a copy and be provided an opportunity by the Appeals Board to offer a rebuttal—is unquestionably correct. See *United States* v. *Cummings*, 425 F.2d 646 (8 Cir. 1970); *Weiner* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969). In *Gonzalez* v. *United States*, 348 U.S. 407 (1965), the Supreme Court unequivocally stated that at least so much is required by minimum notions of due process. There, the registrant was not shown a Department of Justice recommendation on his request for conscientious objector status.[8] Reversing his conviction the Court noted:

> [A] registrant [must] be given an opportunity to rebut this recommendation when it comes to the Appeals Board, the agency with the ultimate responsibility for classification.

348 U.S. at 412. The State Director's statement on appeal, which may refer to any information on the registrant's file "which [the person appealing] believes the local board has failed to consider or to give sufficient weight," is indistinguishable from the Justice Department's recommendation under the formal procedure.

Here, however, the State Director by affidavit stated that he did not exercise his option to append a statement to his

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8 This procedure is no longer in effect, having been repealed by the Military Selective Service Act of 1967. 50 U.S.C. App. 456(j). (1964), repealed by P.L. No. 90-40, §1(7) (1967).

notice of appeal; rather his letter to the Appeal Board noted only that in his opinion Dr. Fein did not qualify for I-O status and that his opinion was based on information in Fein's file. In this posture, Fein's argument must be that due process compels the State Director to frame the issues on appeal or, in the alternative, that registrant-appellee be given an opportunity by the Appeal Board to support the local board's decision. As to the first, the government might convincingly argue that since the Appeal Board hears and decides each case *de novo*, if the appellant-Director does not choose to frame the issues, the registrant is not at any disadvantage.

Fein's alternative contention seems far stronger. Under the regulations, Fein, as appellee, has no right to submit anything in support of the classification below. Certainly, it would be helpful to the Board if the registrant could submit a short statement which marshals the evidence in support of his classification. Fein apparently sought permission to file such a statement with the Appeal Board, but received no response to his inquiry. If the State Director can submit a statement to support his appeal, I think fundamental fairness requires that similarly the registrant-appellee be permitted to be heard in support of the classification he has received.

Fein also argues that the Appeal Board's practice of refusing to give reasons when reversing a classification favorable to the registrant also violates due process. We have recently held that, at least when the registrant appeals, due process is not violated as long as "[t]here was sufficient evidence in the file for appellant to determine the basis for the denial of his claim." *United States* v. *Morico*, 415 F.2d 139, 143 (2 Cir. 1969), rev'd on other grounds, 39 U.S.L.W. 3520 (1970). When, however, it is the State

Director who appeals, several considerations lead me to conclude that a different standard must obtain.

First, the Appeal Board is empowered by the regulations to take cognizance of "general information concerning economic, industrial, and social conditions." Section 1626.24(b). This is an unusual provision, going well beyond the confines of judicial notice. See Preliminary Draft, Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 2-01 (March 1969).[9] Further, the registrant is not informed that the Board is in any way depending upon outside information in reaching a decision nor is he given a chance to rebut its accuracy or relevance. Although our review of a draft classification is tightly proscribed to "any basis in fact," the basis in fact must either be within the four corners of the file, see *United States* v. *Abbott*, —— F.2d —— (9 Cir., April 28, 1970) or the registrant must have been informed of any outside information which is to be considered before the Board decides and given a chance to rebut.

To my mind, the use of such information should be tightly circumscribed. Not only may this information, gathered from well-neigh any source and unchecked by any sort of rebuttal, be simply wrong, see *Bengoecha* v. *Micheli*, 295 F. Supp. 257 (D. P.R. 1969), but it might lead

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9 The Draft Rule imposes strict controls on judicial notice:

"(b) Kinds of Facts. A judicially noticed fact must be either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute."

Rule 2-01(b). Further, provision must be made for challenges:

"(e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed."

Rule 2-01(e).

to wholly invalid inferences.[10] To prevent such misinformation, I would require the Appeal Board either to disclose in advance any "general information" it thinks relevant and give the registrant a chance to rebut or else positively to disclaim any such reliance.

Second, I note that several circuits have now adopted a rule requiring that when a registrant establishes a prima facie case for conscientious objector status, the local board and the Appeal Board must state their reasons for denying the request. In *United States* v. *Houghton*, 413 F.2d 736 (9 Cir. 1969), the Ninth Circuit in reversing a conviction of a conscientious objector for failure to report, stated that

> "Inconsistent statements of actions or a finding of insincerity may support the denial of conscientious status. The local board, however, must state the reasons for the denial of a requested classification when a registrant has 'met the statutory criteria' for classi-

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10 The possibility of this latter sort of error is strong in this case. I note that Fein, in his Selective Service Form 150, stated that while an intern at a highly respected Cleveland hospital, he voluntarily chose to live in the Cleveland ghetto and contributed the very little free time he had to a neighborhood free clinic. The clinic was run by the Students for a Democratic Society. Can any court say with assurance that the Appeal Board may not have seized upon this fact and read it out of context against Fein, under its license to consider "general information about . . . social conditions?"

Even if it be assumed that Fein belonged to SDS and that an inference going to the sincerity or content of a conscientious objector claim could be drawn from the fact of active membership, I am certain that the New York State Appeal Board has no knowledge whatsoever of the principles and ideology of an SDS chapter in Cleveland more than four years ago. It goes without saying that before any inferences may be drawn, there would have to be positive proof that these tenets disqualified a subscriber from conscientious objector status, that Fein knew these tenets, and that he affirmatively embraced them. See, e.g., *Law Students Civil Rights Research Council* v. *Wadmond*, 299 F. Supp. 117, 131 (S.D.N.Y. 1969), prob. juris. noted, 38 U.S.L.W. 3253 (Dec. 10, 1969).

> fication or . . . has placed himself 'prima facie within the statutory exemption.' Otherwise a court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statements, even if true, did not entitle him to the classification, or on the reasonable disbelief of certain allegations necessary to the registrant's prima facie case."

413 F.2d at 739 (citations omitted). Accord, *United States* v. *Broyles*, —— F.2d —— (4 Cir., March 19, 1970) *(en banc)*.

Whether or not the local board need so state reasons whenever a prima facie case is established, see *Morico* v. *United States, supra*, I think it clear that the Appeal Board must do so when the registrant has been granted I-O status below. If in defense to a criminal prosecution for refusal to submit to induction Fein obtains judicial review of this decision, the court would be limited to the "any basis in fact" standard. This means that we would search his file to find any rationale which would support the Appeal Board's decision. In the usual case, where both bodies have rejected the registrant's claim, perhaps this approach is adequate; in any case, it is settled law that our review is so limited. But when the local board has found that the registrant is sincere in his beliefs and that his beliefs meet the statutory criteria, I think a search through the file for any rationale to support the Appeal Board is impermissible. Although the Appeal Board is nominally superior to the local board, I cannot see that its judgment, without the benefit of an interview with the registrant, is to be preferred unless accompanied by an explanation. If it does not agree with the local board, it must state in what ways

it disagrees. Otherwise, reviewing courts—as both the Fourth and Ninth Circuits have found—are blind to potential mistakes of law made by the Appeal Board in the difficult area of conscientious objector classifications.

Thus, when the State Director appeals, due process requires: first, that the registrant be given a copy of any statements the State Director submits on appeal and then be given a chance to respond; second, that the registrant be given the opportunity to submit a statement in support of his classification; third, that the Appeal Board positively disclaim any reliance on "general information" or, if it has so relied, give the registrant ample notice of the information it thinks relevant and a chance to rebut; and fourth, the Appeal Board state the rationale for any decision which reverses the local board.

I would reverse the judgment of the district court and remand with instructions that the injunction Fein seeks should issue.

Military Selective Service Act of 1967

§10(b)(3) 50 U.S.C. App. §460(b)(3)

No judicial review shall be made of the classification or processing of any registrant by a Local Board, Appeal Board, or the Presidential Appeal Board except as a defense to a criminal prosecution. . . .

28 U.S.C. §1331(a)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Selective Service Regulations

32 CFR

1626.1 Appeal by Director and State Director.—Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State may appeal from any determination of a local board at any time.

1626.11 How Appeal to Appeal Board Is Taken.—(a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal.

1626.12 Statement of Person Appealing.—The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

1626.24 Review by Appeal Board.

* * *

(b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions.

1627.1 Who May Appeal to the President From Any Determination of an Appeal Board.—(a) When either the State Directors of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of an appeal board. He may take such an appeal at any time.

1627.3 Appeal to President.—When a registrant has been classified by the appeal board and one or more members of the appeal board dissented from that classification, the registrant, any person who claims to be a dependent of the registrant, or any persons who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant may appeal to the President within 30 days after the mailing by the local board of the Notice of Classification (SSS Form 110) notifying the registrant of this classification by the appeal board. The local board may permit any person who is entitled to appeal to the President under this section to do so, even though the 30-day period for taking an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such 30-day period was due to lack of understanding of the right to appeal or to some other cause beyond the control of such person.

Portion of Affidavit of Petitioner Read in Support of Motion for Injunction and Declaratory Judgment.

"(a) War in any form violates the fundamental religious and moral precept that man must live in his community always conscious of the individual value of each human being and that, in addition, war curbs and extinguishes rather than expands man's potential for functioning and good.

"(b) In the code of human relations all religions find their common ground and the substance of my beliefs stems from the common foundations of all religions. The value of theology in this regard is of particular importance in distinguishing the credal differences between religions.

"(c) The sources which shaped my beliefs and have molded my training were my parents, from whom I gained the basis spiritual approach to life, the Lutheran Church, from which I grasped the concepts of equality of man before God and the singular value of each individual human being to God, the civil rights movement, which was my first experience in non-violent principles and tactics in effecting social change, and from the practice of medicine which served in large measure as an extension of the practical training which began in the civil rights movement. In medicine I found a vocational way of expressing my spiritual and moral values and it has presented me with a new training ground for the practice of my beliefs.

"(d) There was no circumstance in which I could envisage participation in society's use of force for any reason with the limitation that, while I do not know how I would react if violently attacked myself, it is conceivable that my response might be to disarm an opponent. This individual limitation relates merely to a unique situation which I have never in fact encountered and is not generalizable to nation-states and war." (1Ga-17a)

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SUPREME COURT, U. S.

76-58

No. ~~1120~~

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In the Supreme Court of the United States

OCTOBER TERM, 1970

OLIVER T. FEIN, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

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SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 19–24) is unreported. The opinion of the court of appeals (Pet. App. 25–48) is reported at 430 F. 2d 376.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1970. On October 16, 1970, Mr. Justice Harlan extended the time to file a petition for a writ of certiorari to and including December 19, 1970, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

414-668—71

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 460(b)(3)) permits a pre-induction judicial challenge to the validity of the Selective Service appeal procedures.

STATUTE INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3), provides in relevant part:

* * * * * *

> * * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution * * *, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. * * *

STATEMENT

Petitioner, a medical doctor, was classified II–S (student deferment) while pursuing his studies and then II–A (occupational deferment) during his internship. When still classified II–A, he filed an application for a I–O (conscientious objector) classification, which was denied by his local board on the

ground that petitioner "at that time" did not qualify for I–0 status (Pet. App. 26).

In February 1968, petitioner's II–A classification expired and his local board reclassified him as I–A (available for military service). Petitioner requested and was granted a personal appearance before the local board, following which the board determined that he qualified as a conscientious objector and granted him a I–O classification (Pet. App. 26).

Pursuant to 32 C.F.R. 1626.1, the State Director of Selective Service appealed the petitioner's I–O classification to the state appeal board. Petitioner unsuccessfully sought a statement of the reasons for the appeal. The appeal board, without giving reasons, unanimously reversed the determination of the local board and reinstated petitioner in class I–A. The State Director subsequently informed petitioner that his decision to appeal the local board classification had been based on information in petitioner's selective service file (Pet. App. 26–27); the State Director had said no more to the appeal board (Pet. App. 44).

An appeal was taken from the appeal board determination to the Presidential Appeal Board, which affirmed the I–A classification made by the state appeal board without stating reasons (Pet. App. 27). Thereafter the local board ordered petitioner to report for induction (Pet. 5). Petitioner then brought this action in the United States District Court for the Southern District of New York to enjoin his induction.

The district court ruled that petitioner's action was barred by Section 10(b)(3) of the Military Selective Service Act of 1967 and accordingly granted the government's motion to dismiss the complaint (Pet. App. 19–24). The court of appeals agreed; Judge Hays, in a separate concurrence, concluded in addition that petitioner had not established the jurisdictional amount required under 28 U.S.C. 1331 (Pet. App. 32). Chief Judge Lumbard dissented; in his view, the present case is within the *Oestereich* exception to Section 10(b)(3), the 28 U.S.C. 1331 requirement is met, and the merits of petitioner's claim entitle him to the relief sought (Pet. App. 32).

ARGUMENT

1. Petitioner's suit was properly held barred by Section 10(b)(3), which precludes "judicial review * * * of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution * * *, after the registrant has responded either affirmatively or negatively to an order to report for induction * * *." *Oestereich* v. *Selective Service Board*, 393 U.S. 233, and *Breen* v. *Selective Service Board*, 396 U.S. 460, provide no basis for a pre-induction attack on the procedures under which petitioner was ultimately denied a conscientious objector exemption. The narrowness of the limitations upon Section 10(b)(3) recognized in those cases is made clear by the Court's explanation in *Breen* (396 U.S. at 467) that—

> In both situations a draft registrant who was required by the relevant law not to be inducted

was in fact ordered to report for military service. * * *

Unlike the registrants in *Oestereich* and *Breen*, petitioner has not been denied a classification to which he is entitled as a matter of law under the Act. Like the registrant denied preinduction review in *Clark* v. *Gabriel*, 393 U.S. 256, petitioner bases his claim to exemption upon a conscientious objector submission, the consideration of which "inescapably involves a determination of fact and an exercise of judgment. * * * To allow pre-induction judicial review of such determinations would be to permit precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower' (113 Cong. Rec. 15426 (report by Senator Russell on Conference Committee action)) which Congress sought to prevent when it enacted § 10(b)(3)." *Id.* at 258–259. See *Brookout* v. *Thomas*, 430 F. 2d 1343 (C.A. 9). Cf. *Sloan* v. *Local Board No. 1, Bernalillo County, N.M.*, 414 F. 2d 125 (C.A. 10); *Stella* v. *Selective Service System of U.S. of A., Loc. Bd. No.* 66, 427 F. 2d 887 (C.A. 2); *Edwards* v. *Selective Service Local Board No. 111*, 432 F. 2d 287 (C.A. 5).

Petitioner seeks to distinguish his case on the ground that it asserts general constitutional challenges to the appeal procedures. But this does not eliminate the obstacle that he has no claim under the selective service statute, as this Court's decision in *Boyd* v. *Clark*, 393 U.S. 316, shows. In *Boyd*, four Selective Service registrants attacked Section 6(h)(1) of the Act (50 U.S.C. App. 456(h)(1)) on the ground that student deferments in general unconstitutionally dis-

criminate against registrants economically unable to attend college, and bear no reasonable relationship to the purposes of the Act. The three-judge district court to which this attack was presented dismissed the action on grounds other than Section 10(b)(3) (287 F. Supp. 561 (S.D. N.Y.)). On appeal, this Court affirmed *per curiam* on the authority of *Clark* v. *Gabriel, supra,* without reaching the other reasons for dismissal given by the district court. Since *Clark* v. *Gabriel* rested upon Section 10(b)(3), *Boyd* was a clear holding that the Section 10(b)(3) proscription may not be circumvented by framing the claim in terms of a constitutional challenge—as petitioner would do here. See also *Czepil* v. *Tarr*, No. 244, this Term, certiorari denied, October 12, 1970. Here, as in those cases, the registrant's remedy is to assert his objection to his classification, and the processing of his conscientious objector claim, by a petition for a writ of habeas corpus after induction or as a defense to a criminal action.

2. In any event, Judge Hays properly concluded in his concurrence below (Pet. App. 32) that the district court lacked jurisdiction over petitioner's complaint, because it did not meet the $10,000 jurisdictional amount requirement of 28 U.S.C. 1331. The only available grounds for federal jurisdiction in suits of this sort are the general grants of federal question and diversity jurisdiction, both of which apply only where "the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs" (28 U.S.C. 1331, 1332). *Oestereich* expressly acknowledges the ap-

plicability of the amount-in-controversy requirement; after finding that that suit was not barred by Section 10(b)(3), the Court remanded the case to afford the registrant the opportunity "to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. § 1331." 393 U.S. at 239. See also *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817, 826 (C.A. 2); *Goldsmith* v. *Sutherland,* 426 F. 2d 1395 (C.A. 6), certiorari denied, No. 579, this Term, December 14, 1970.

Congress has conditioned access to the federal courts on a litigant's ability to establish that his dispute involves a minimum monetary amount, and the federal courts may not ignore this requirement even though it may necessitate rejection by them of civil cases that otherwise bring into question significant federal rights. This is not one of those situations where Congress has made a specific determination to allow suits without any showing of jurisdictional amount, as it has in the various Civil Rights Acts and other statutes, *e.g.,* 28 U.S.C. 1337, 1339, 1340, 1343, 1344, 1346; 45 U.S.C. 51 *et seq.* (Federal Employers' Liability Act); 46 U.S.C. 688 (Jones Act). Accordingly, the plain language of Section 1331 seems clearly to preclude federal jurisdiction over petitioner's pre-induction civil action, even if Section 10(b)(3) did not, since petitioner has submitted no factual support for the allegation in his complaint that the jurisdictional amount is involved.

3. Since, for the foregoing reasons, the district court properly dismissed the complaint for lack of jurisdiction, we deem it unnecessary to discuss petitioner's

claim on the merits. We do point out, however, that petitioner, like any other registrant whose conscientious objector claim has been rejected by the Selective Service System, may assert on habeas corpus following his induction any contention he may have that there was no basis in fact for the denial of his claim; he has not asserted any such contention—properly—in this pre-induction civil suit.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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No. ~~1129~~ 70-58

OLIVER T. FEIN,

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v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1970

No. 1129

OLIVER T. FEIN,

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v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court is unreported and appears at A. 90-96.[1] The majority opinion of the Court of Appeals is reported at 430 F. 2d 376, and appears at A. 97-103, and the dissenting opinion appears at A. 104.

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[1] "A" references are to the Single Appendix filed with this Brief.

Jurisdiction

The judgment of the Court of Appeals was entered on July 24, 1970. On October 16, 1970, Mr. Justice Harlan extended the time in which to file the Petition for a Writ of Certiorari to and including December 19, 1970, on which date it was filed. Certiorari was granted on March 8, 1971. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

Constitutional, Statutory and Regulatory Provisions Involved

The pertinent provisions of Article III, § 2 of the Constitution and the Fifth Amendment thereto; the Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(3); 28 U.S.C. § 1331; and 32 CFR §§ 1623.2, 1626.1, 1626.11, 1626.12, 1626.24(b), 1627.1, 1627.3(a) are set forth *infra*, pp. 1a-4a.

Questions Presented

1. Where, after lengthy correspondence, two personal interviews and extensive personal testimonials, a Selective Service registrant is granted conscientious objector status by his Local Board, does it violate procedural due process for the State Director to appeal and the State Appeal Board to revoke such status summarily, without

(a) notice to the registrant by either the State Director or the Appeal Board of the issues and underlying factual questions involved on the appeal;

(b) disclosure to the registrant of statements by the State Director which were submitted to the Appeal Board;

(c) limitation on the Appeal Board to confine its considerations to the record, but rather permitting it to go beyond the record and consider, without notifying the registrant, "general information regarding economic, industrial and social conditions in the community";

(d) opportunity for the registrant to present to the Appeal Board a statement in support of his conscientious objector classification and in rebuttal to any submission by the State Director and any information which the Appeal Board deems adverse; and

(e) statement of reasons by the Appeal Board for revoking the registrant's conscientious objector status?

2. Does the statutory delegation of power to the President in 50 U.S.C. App. § 460(b)(3) to prescribe "rules and regulations" for appeals from local board classifications authorize revocation of a registrant's conscientious objector status by the summary process described in Question 1?

3. Is a State Director authorized by statute to prosecute a plenary appeal from a Local Board's determination granting a registrant conscientious objector status?

4. Where a registrant's conscientious objector status has been revoked under fundamentally unfair and statutorily unauthorized procedures, and where all administrative appellate remedies have been exhausted and the registrant has been ordered to report for induction, is the registrant nevertheless barred from seeking redress in a district court prior to submitting to or refusing induction by § 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(3) or by the jurisdictional amount requirement contained in 28 U.S.C. § 1331(a)?

Statement of the Case

Petitioner is a doctor of medicine, currently practicing in the field of community health in New York City. He is a registrant of Local Board 7, Yonkers, New York, which had classified him as a student (II-S) for the duration of his academic career. Subsequently, petitioner was granted an occupational deferment (II-A) for performance of work in the national interest on the basis of his internship in medicine and pediatrics at Cleveland Metropolitan General Hospital.

In September, 1967, while petitioner was so deferred, he notified his Local Board that he was a conscientious objector (A. 27). Thereafter, he filed a formal application for conscientious objector status declaring his opposition to participation in war in any form by reason of his religious training and belief (A. 29).

In support of his application, petitioner recited early and rigorous religious training by his parents, in the Lutheran Church and through a Quaker education (A. 38-39, 42-43). He also identified as sources of his religious beliefs his experience with non-violent demonstrations in the Civil Rights Movement, his medical training and his activity while an intern establishing a ghetto community health project in 1966, at the request of the Students for a Democratic Society (A. 40, 43-45).

Based on his formal and informal religious training and experiences, petitioner concluded, as he stated in his application for conscientious objector status, that "religion sets forth a guideline for human conduct which determines how human beings should relate to each other . . . . It is in the codes for human relations that all religions find their common ground. The substance of my beliefs stems from this foundation of all religions" (A. 38). In a subsequent letter to the Local Board, petitioner said: "My religious

training has nurtured within me a set of beliefs about the quality of 'goodness' in all men, which imposes certain duties on my conduct. Thus, my beliefs have directed my life: where I live, with whom I work, the type of work I do. It is this set of beliefs that leads me to be conscientiously opposed to war, and willing to accept the consequences, alternative service or jail" (A. 40). See also A. 13-14.

Upon receipt of petitioner's application, the Local Board carefully canvassed the sincerity of petitioner's beliefs both by examining reference letters it had obtained from a Lutheran clergyman, the Dean of Western Reserve Medical School and numerous medical colleagues of petitioner (A. 47-52) and by assessing petitioner's demeanor and credibility at two personal interviews.

After the first such interview on November 15, 1967, the Local Board, consistent with 32 CFR 1623.2, which requires that a registrant be placed in the lowest classification to which he is entitled, retained petitioner in classification II-A stating that he did not qualify as a conscientious objector "at that time" (A. 58).

Following reclassification to I-A and a second detailed personal interview, the Local Board, on May 27, 1968, found that petitioner met the standards of sincerity and opposition to participation in war in any form based upon his religious training and belief, and classified him as a conscientious objector (1-O) (A. 61-62).

On June 4, 1968, petitioner was advised by letter that the State Director intended to appeal the Local Board's determination because, in his "opinion", petitioner "would not qualify for a 1-O classification as a conscientious objector" (A. 63). No further explanation was given, and petitioner was informed merely that he would be advised of the Appeal Board's decision (A. 63-64).

Petitioner immediately wrote and requested from both the Local and Appeal Boards a "statement indicating the

basis for the State Director's appeal" and "an opportunity to reply to such statement" (A. 66).

Petitioner never received a pertinent response to these requests. The only word of any kind petitioner received from the Appeal Board was a form styled Individual Appeal Record dated June 20, 1968, which stated that by a vote of 4-0 he had been reclassified 1-A. No reasons were given on that form or otherwise for the Appeal Board's action.

On July 31, 1968, petitioner was ordered to report for induction.[2]

On February 10, 1969, petitioner filed suit in the Southern District of New York, seeking a judgment declaring the appeal procedure followed by the State Director and State Appeal Board to be unauthorized by statute and in violation of constitutional standards of procedural due process and seeking an order enjoining his induction and restoring him to conscientious objector status.

The District Court sustained respondent's motion to dismiss on the grounds that under § 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(3), (hereinafter referred to as "§ 10(b)(3) of the Act") the court lacked jurisdiction to hear petitioner's claims (A. 90-96).

On July 23, 1970, the Court of Appeals for the Second Circuit affirmed. The majority sustained the district court's holding based on § 10(b)(3) (A. 97). Circuit Judge

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[2] This order was subsequently postponed and then cancelled pending an appeal to the Presidential Appeal Board, which, by order dated November 26, 1968, affirmed the State Appeal Board's action, also without stating any reasons. During the pendency of this appeal, petitioner twice wrote to the State Director requesting the basis for his decision to appeal the 1-O classification to enable petitioner to submit a relevant statement to the Presidential Appeal Board (A. 82, 83). After the second letter, the State Director responded by stating simply that his decision to appeal "was based upon the information contained in your [petitioner's] selective service file" (A. 84).

Hays concurred, finding in addition that petitioner's failure to establish the jurisdictional amount under 28 U.S.C. § 1331(a) deprived the court of subject matter jurisdiction.

Chief Judge Lumbard dissented. He concluded that in light of this Court's recent decisions construing § 10(b)(3), the district court had jurisdiction to determine whether petitioner's conscientious objector status was revoked by constitutionally invalid or statutorily unauthorized procedures (A. 33). While expressing doubt that a jurisdictional amount requirement could constitutionally be imposed in the case of a "poor man who stands to lose nothing but his most precious personal liberties," Judge Lumbard concluded that there was no need to decide the question because respondents had not, and in all likelihood could not, maintain the heavy burden of disproving petitioner's jurisdictional amount allegation (A. 113). On the merits, Judge Lumbard found that petitioner's reclassification was accomplished by a fundamentally unfair procedure and that, in addition, there was a strong possibility the Appeal Board had indulged in an unwarranted political assumption, based on information outside of the record, that petitioner's participation as a doctor in a clinic sponsored by the Students for a Democratic Society disqualified him from status as a conscientious objector (A. 118).

Summary of Argument

A. The Selective Service appellate regulatory scheme particularly as it affects conscientious objectors whose classification has been acknowledged by local boards is riven with violations of due process. Virtually every protection invested by the federal system over three decades of experience with administrative agency review is absent.

More particularly, there is no provision made for a recitation of reasons or applicable issues by the State Direc-

tor; no right to submit a meaningful, indeed any, response to the Appeal Board; no right to a statement of criteria utilized by the Appeal Board and no right to specific findings made by the Appeal Board. In addition the Appeal Board is permitted to take cognizance of information outside the record without notification to the registrant. The unbridled summary review power with no procedural protection for petitioner makes the review procedures followed here fundamentally lawless.

B. The summary appellate procedures are nowhere authorized by statute in other than general terms. This general delegation of power to prescribe rules and regulations is insufficient to justify sustaining such procedures, particularly in a circumstance in which there is a strong Congressional policy to afford meticulous procedural protections to conscientious objectors. The failure to provide full administrative review so rends the fabric of Selective Service operation in general as to violate fundamental fairness.

In addition, there is no specific statutory authority permitting an appeal by the State Director when the Local Board has determined that, after assessing the facts, a registrant is a conscientious objector. Pursuant to statute, the Local Board is the linch-pin of the Selective Service scheme. The concept of classification by members of one's local community is destroyed if an appeal in this case is permitted.

C. Revocation of petitioner's conscientious objector status by fundamentally unfair and statutorily unauthorized procedures constitutes blatantly lawless conduct which § 10(b)(3) does not insulate from pre-induction judicial review. The conduct of the Selective Service System following a finding by the Local Board that petitioner was a conscientious objector conflicts with the statutory requirement that conscientious objectors shall not be subject to training and service. Additionally pre-induction review is mandated in this case because it both falls within the ex-

ceptions recited in *Oestereich* and *Breen* and would pose a litigant with the alternative of no judicial review by a competent forum for exercising religious beliefs prior to the imposition of punishment.

Finally the purpose of § 10(b)(3) is enhanced where because there is no possibility of litigious interruption of the operations of the Selective Service System since the attack by petitioner is limited to legal issues rather than factual questions relating to classification and processing.

D. The $10,000 jurisdictional amount requirement cannot prevent assumption of jurisdiction where fundamental rights are at issue. To fail to find jurisdiction where such rights are present is to attempt to place a monetary amount on rights of infinite value and concern.

POINT I

The State Director's appeal and the State Appeal Board's revocation of petitioner's conscientious objector status, without any notice, opportunity to be heard and statement of reasons, violated petitioner's right to procedural due process.

Petitioner's Local Board granted him conscientious objector status following a thorough and careful review of the evidence in his Selective Service file and two extensive personal interviews at which his sincerity and beliefs were assessed by close observation of his demeanor and credibility.[8] Immediately thereafter, without giving peti-

[8] The personal interview by the Local Board is the most exacting and usually the most decisive test of a registrant's sincerity, because a claim of conscientious objector status will be lost if the Board concludes that a registrant's "demeanor appeared shifty or evasive or that his appearance was one of unreliability." *Witmer* v. *United States*, 348 U.S. 375, 382. The Local Board's decision in this regard is unreviewable, since the Appeal Board has no similar opportunity, under present procedures, to personally examine the registrant. See *United States* v. *Abbott*, 425 F. 2d 910, 913 (8th Cir. 1970).

tioner any reasons, the State Director appealed the local board's determination.

There followed a process of review by the State Appeal Board notable only for the summary manner in which it was conducted. Both the State Director and the Appeal Board ignored petitioner's requests for a statement indicating the basis for the appeal and an opportunity to respond to such statement. The Appeal Board did not solicit any information from petitioner as to any issue or factual question presented by the appeal, despite the fact that as to matters other than demeanor and credibility, the Board's review was *de novo*.[4] There is also a strong indication that the Appeal Board considered information extrinsic to the record, of which petitioner was not given notice and consequently was unable to rebut.[5] Little more than two weeks after the appeal was filed, the Appeal Board revoked petitioner's conscientious objector status without stating any reasons for its decision.

For any registrant, revocation by an Appeal Board of a statutory exemption or deferment is a matter of the

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[4] See *McKart* v. *United States*, 395 U.S. 185, 198 n. 16; *McGee* v. *United States*, — U.S. —, 39 U.S. Law Week 4571, 4574; *United States* v. *Abbott*, *supra*, at 913 and n. 4.

[5] The Board might have abused its authority in taking administrative notice of "general information concerning economic, industrial and social conditions", under 32 CFR § 1626.24(b)(2), by drawing adverse inferences from petitioner's affiliation with a ghetto health clinic in Cleveland sponsored by the Students for a Democratic Society (A. 118).

In addition, petitioner has repeatedly asserted that the State Director's appeal was accompanied by either an oral or written statement to the Appeal Board specifying allegedly adverse evidence, or at least directing the Board's attention to what he considered to be the defects in the Local Board's determination. It has been the practice of State Directors in taking appeals from Local Board determinations favorable to registrants to submit such statements to the Appeal Boards. See *United States* v. *Cummins*, 425 F. 2d 646 (8th Cir. 1970); *Wiener* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969); *Nevarez Bengoechea* v. *Micheli*, 295 F. Supp. 257 (D.P.R. 1969). Respondents have neither confirmed nor denied the existence of such a statement in this case.

greatest personal consequence. Certainly, if what constitutes "procedural due process" in administrative proceedings is a function of the extent to which an individual may "be condemned to suffer grievous loss", *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263; *In re Gault*, 387 U.S. 1, 67 (Mr. Justice Harlan concurring); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (Mr. Justice Frankfurter concurring), then petitioner and other registrants—as this Court has held—are entitled to scrupulous adherence by the Selective Service System to those fundamental safeguards, without which no administrative determination of such import can be presumed fair and reliable.[6]

As a bare minimum petitioner was entitled to be (i) notified of the issues and factual questions raised by the State's Director's appeal, (ii) afforded an opportunity to be heard in response by submitting a written statement to the Appeal Board and (iii) given a statement of reasons for the Board's adverse decision. The Appeal Board's failure to adhere to these basic requirements of due process was in blatant disregard of the clear and consistent rulings of this Court over the last several decades.

1. If a registrant is to be treated with at least rudimentary fairness, then he must be given an opportunity

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[6] See *Gonzales* v. *United States*, 348 U.S. 407, 412-413; *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233, 241-242 (Mr. Justice Harlan concurring). In *Olvera* v. *United States*, 223 F. 2d 880, 882 (5th Cir. 1955) (cited with approval in *Mulloy* v. *United States*, 398 U.S. 410, 416 n. 5) the court stressed the point "that when every requirement of due process has been observed by the board, its fact decisions, unless wholly unsupported, are not subject to review . . . [but] that a failure to follow [such procedural requirements with] strictness and fidelity will invalidate the order of the board. . . ." Similarly, *United States* v. *Freeman*, 388 F. 2d 246, 248 (7th Cir. 1967) held that "the procedural framework of the draft classification process and the narrowly limited judicial review available to draft registrants make adherence to procedural safeguards crucial to the maintenance of basic fairness." Cf. *Ohio Bell Tel. Co.* v. *Pub. Util. Comm'n.*, 301 U.S. 292, 304-305.

to be heard by the Appeal Board before it makes a final decision revoking his conscientious objector status, reclassifying him 1-A, and thus rendering him susceptible to induction. *Gonzales* v. *United Staes, supra*; Cf. *Goldberg* v. *Kelly, supra,* at 267; *Wisconsin* v. *Constantineau,* — U.S. —, 39 U.S.L. Week 4128, 4129.

An opportunity to be heard is the "only means", said the Court in *Gonzales* v. *United States, supra,* at 414, "of insuring that [the Appeal] Board will have all the relevant data." This right is of even greater importance to the registrant because it represents his only chance of meeting the issues on appeal by correcting or supplementing the record before the Appeal Board—the record upon which he must ultimately rely in any attempt to overcome the basis-in-fact barrier to judicial review. *United States* v. *Owen,* 415 F. 2d 383, 389 (8th Cir. 1969). Precisely because it enables a registrant to develop a complete record, "the opportunity for full administrative review", as the Court recently said, "is indispensable to the fair operation of the Selective Service System." *Mulloy* v. *United States,* 398 U.S. 410, 416.[6a]

The right of a registrant to be heard through submission of a written statement in support of his classification

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[6a] Failure to afford a registrant an opportunity to present his case to the Appeal Board renders the appeal record incomplete and fundamentally defective. Since judicial review of the merits of a registrant's classification is confined to the appeal record, it certainly would be unfair for a court to determine the existence of a basis in fact from a record, like the one in this case, which does not contain a complete statement of the registrant's position and supporting evidence. In *Cox* v. *United States,* 332 U.S. 442, 444-445, this Court based its approval of the procedure limiting judicial review of Selective Service classifications to the administrative record, specifically upon its finding that "the board records were made by [the registrants]" and that it "was open to them [the registrants] to furnish full information as to their activities." See also *United State* v. *Owen,* 415 F. 2d 383, 389 (8th Cir. 1969); *United States* v. *Purvis,* 403 F. 2d 555, 560 (2d Cir. 1968); and *infra* at pp. 31-32.

before the Appeal Board renders a final decision will in no way encumber the process of military selection. Indeed, such a submission is consistent with the "over-all procedures set up in the statute and regulations, [which are] designed to be 'fair and just' in their operation. . . ." *Gonzales* v. *United States, supra,* at 417; see also *Simmons* v. *United States,* 348 U.S. 397, 405. Thus, under 32 CFR § 1626.12 a registrant who appeals an unfavorable local board classification is entitled to file a statement with the Appeal Board to rebut adverse findings by the local board. This procedure was held by the Court in *Gonzales* to be "broader than the bare right to correct 'errors' " and to include the right of a registrant to fortify his qualifications for the classification he desires by furnishing the Appeal Board with supplementary information. *Id.* at 417.[7]

A registrant in petitioner's situation has an equal, if not greater, right to be heard in defense of a favorable classification by the local board. Here the State Director's appeal, without specification, requires the Appeal Board to search out a basis for overturning the local board determination; the appeal process therefore takes on all the trappings of an adversarial proceeding. Cf. *In re Gault,* 387 U.S. 1; *In re Ruffalo,* 390 U.S. 544. This situation is compounded by the absence of the independent Justice Department review procedures, which were not retained by Congress in the 1967 Selective Service Act. *United States* v. *Owen, supra* at 389.

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[7] After petitioner's personal references learned of the State Director's appeal, several of them wrote to the Appeal Board on petitioner's behalf. The Appeal Board, while not objecting to the submission of these letters in principle, acted in such a summary and secretive manner on petitioner's case that these letters arrived too late to be included in the record. Treatment of petitioner in this fashion comports with neither the open and deliberative appeal process Congress intended, nor the elementary demands of due process. *United States* v. *Ford,* 431 F. 2d 1310 (1st Cir. 1970); *United States* v. *Bellmer,* 404 F. 2d 132 (3rd Cir. 1968); *Slettehaugh* v. *Tarr,* 322 F. Supp. 180 (D. Minn. 1971).

In *Gonzales*, this Court held that a registrant must be afforded an opportunity to submit a statement to the Appeal Board in response to an adverse recommendation by the Justice Department. Similarly, in this case, as Chief Judge Lumbard concluded, petitioner should have been afforded an opportunity to submit a statement presenting his position on any issue or factual question which the Appeal Board deemed to have been raised by the State Director's appeal.

2. Obviously, timely and adequate notice of the issues and factual questions on appeal is implicit in the registrant's right to be heard. See *Goldberg* v. *Kelly*, *supra* at 267; *In re Gault*, 387 U.S. 1, 33-34 and 73 (Mr. Justice Harlan concurring). There is no ground for dispute on this point, since, as the Court ruled in *Gonzales*, "the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with an awareness of the recommendations and arguments to be countered." *Id.* at 415. See also *In re Ruffalo*, *supra* at 550; *Morgan* v. *United States*, 304 U.S. 1, 18; *Ohio Bell Tel. Co.* v. *Pub. Util. Comm'n*, 301 U.S. 292, 300-305; *United States* v. *Abilene & So. Ry. Co.*, 265 U.S. 274, 389.

It would amount to no hearing at all if a registrant were merely advised that he might submit a statement in support of his conscientious objector status, without any indication to him of what the Appeal Board considered pertinent—indeed, what it considered conclusive unless rebutted.[8] In *Chernekoff* v. *United States*, 219 F.2d 721

[8] Prior to 1967, it might have been argued that a registrant claiming conscientious objector status was adequately notified of the issues on appeal upon receipt, pursuant to this Court's rulings, of a "fair resume" of any adverse evidence unearthed by the FBI investigation and a copy of the Justice Department recommendation to the Appeal Board. But today, in the absence of these procedures, the failure of the Appeal Board to notify a registrant in petitioner's circumstances of the precise issues forces him to "proceed in darkness." *United States* v. *Broyles*, 423 F. 2d 1299, 1305-1306 (4th Cir. 1970) (*en banc*).

(9th Cir. 1955) the court condemned as a violation of due process the failure of an Appeal Board to notify a registrant that it was considering derogatory information contained in his file. Any registrant who attempted to present his case to an Appeal Board in these circumstances would be in the position, as the Ninth Circuit graphically put it, of a "blind man striking at an invisible foe." *Id.* at 723-724.

In closely analogous cases, the failure of a local board to state reasons for an unfavorable classification has been unanimously treated by the courts, which have had occasion to review this procedure, as a denial of procedural due process because such failure prevents a registrant from prosecuting a meaningful administrative appeal. As Judge Weinstein stated in *United States* v. *St. Clair*, 290 F. Supp. 337, 345 (E.D.N.Y. 1968):

> "Where no facts or inferences upon which the Local Board's conclusion is based are stated, effective rebuttal is impossible. No advocate can persuasively assert grounds for reversal when the bases for decision below are unknown." See also *Brown* v. *Resor*, 429 F. 2d 1340, 1343 (10th Cir. 1970.)

So, too, where the State Director appeals a favorable Local Board determination, it is incumbent on the Appeal Board to provide the registrant with specific notice of the issues on appeal. This will not entail any interruption

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Surely, as evidenced by his letters to the Appeal Board and the State Director, petitioner cannot be presumed to have "knowledge" of what they perceived to be the issues. Petitioner has never even had the benefit of the "vague hints" which this Court found insufficient notice in *Simmons*. In *Simmons*, moreover, the Court applied a subjective test: whether, in fact, the registrant had been alerted to the issues. Given the background of this case, particularly the fact that the local board sustained petitioner's claim for conscientious objector status, it cannot seriously be argued that such a test could be met here. Nor can it be argued that petitioner's speculations, if any, as to what the issues might be provide a substitute for constitutionally adequate notice, one of the purposes of which is to "clarify the issues to be considered." *In re Gault, supra* at 34 n. 54.

of the Board's processes. By regulation, 32 CFR § 1626.23, the Appeal Board is required to conduct a preliminary review of each file forwarded to it on appeal, to determine whether the "record is complete" and whether the information in the file is sufficient to enable it to determine the registrant's classification. Certainly, after such review of petitioner's file had been completed, the Appeal Board was fully cognizant of the precise issues, and it would have been only fair to have given petitioner notice at that point of these issues so that he could have submitted a relevant response.

Clearly, under *Gonzales* and *Simmons*, such notice should also have advised petitioner of any statement or recommendations submitted by the State Director to the Appeal Board. Based on these decisions, the court in *United States* v. *Cummins*, 425 F. 2d 646 (8th Cir. 1970) recently upheld a registrant's "right to be notified, upon request, of any statement placed in the registrant's file by the State Director in the process of appealing." *Id.* at 649. See also *United States* v. *Thompson*, 431 F. 2d 1265, 1271 (3rd Cir. 1970); *United States* v. *Owen*, *supra*, at 388-389; *United States* v. *Cabbage*, 430 F. 2d 1037, 1039-1041 (6th Cir. 1970); *Murray* v. *Blatchford*, 307 F. Supp. 1038, 1054-1055 (D.R.I. 1969); *Wiener* v. *Local Bd. No. 4*, 302 F. Supp. 266 (D. Del. 1969); *Nevarez Bengoechea* v. *Micheli*, 295 F. Supp. 257 (D.P.R. 1969).[9]

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[9] When petitioner's case was submitted to the Appeal Board on June 20, 1968 for its consideration, the Board was given a "brief" prepared by one of the Local Board's employees, which apparently contained a "summary of the registrant's Selective Service file." (A. 89h). The respondents assured the courts below that this "brief" did not "contain any information not contained within the file. Although we have never received a copy of this "brief" it is safe to assume that it does not recite verbatim and unselectively the contents of petitioner's file. Clearly, under *Simmons* and *Gonzales*, petitioner should have been given a copy of this "brief" before it was presented to the Appeal Board, so that he could correct any errors or call the Board's attention to material in his file to which the "brief" did not refer.

Similarly, a registrant should receive prior notice of the Appeal Board's intention to take cognizance of information outside the record, such as "general information concerning economic, industrial and social conditions", pursuant to 32 CFR § 1626.24(b). In this case, Chief Judge Lumbard found that there was a serious danger that the Appeal Board had utilized this power and had, in rendering its decision, relied upon "invalid inferences" drawn from the fact that in 1966, while the petitioner was an intern at a Cleveland hospital, he contributed his spare time to a ghetto neighborhood free clinic sponsored by the Students for a Democratic Society (A. 118). No valid concept of administrative notice permits such undisclosed, let alone such unfounded, considerations to influence the decision-making process of any agency. See *Garner* v. *Louisiana*, 368 U.S. 157, 173; *Ohio Bell Tel. Co.* v. *Comm'n*, *supra* at 301-302; *Murray* v. *Blatchford*, *supra* at 1051, 1054-1055.

3. Equally fundamental, as Chief Judge Lumbard concluded, is petitioner's right to a statement of reasons by the Appeal Board for its decision (A. 119).

"The orderly functioning of the process of judicial review requires that the grounds upon which the administrative agency acted be clearly disclosed . . ." *SEC* v. *Chenery Corp.*, 317 U.S. 80, 94. See also *Goldberg* v. *Kelly*, *supra* at 271; *Specht* v. *Patterson*, 386 U.S. 605, 610; *National Geographic Society* v. *District Unemployment Comp. Bd.*, 438 F. 2d 154, 158 (D.C. Cir. 1970); 2 Davis, *Administrative Law* § 16.05. (1970 Supp.). The soundness of this principle is nowhere more apparent than in cases, such as the present one, involving an Appeal Board's unexplained determination to revoke a registrant's conscientious objector status. Since the "ultimate question" in conscientious objector cases is "the sincerity of the registrant", *Witmer* v. *United States*, 348 U.S. 375, 381, "any fact which casts doubt on the veracity of the registrant is relevant", *id.* at 382. In the absence of specific find-

ings, intelligent judicial review on the issue of sincerity is impossible because

> "A court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statements, even if true, did not entitle him to the classification, or on the reasonable disbelief of certain allegations necessary to the registrant's prima facie case." *United States* v. *Haughton*, 413 F.2d 736 (9th Cir. 1969).[10]

Because the Appeal Board did not personally examine petitioner, it could not properly reverse the Local Board on the grounds that it did not believe him. But, even the presence of this fundamental error can not be detected by a reviewing court without a statement of reasons by the Appeal Board. See *Witmer* v. *United States, supra* at 382-383; *United States* v. *Abbott, supra* at 914 n. 5; cf. *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196-197.

POINT II

The summary procedures employed by the State Director and State Appeal Board to revoke petitioner's conscientious objector status were not authorized by the Selective Service Act of 1967 and, to the contrary, were in violation of the fair hearing procedures implicitly guaranteed by that statute.

Appeals from local board determinations may be prosecuted under the Selective Service Act of 1967 [50 U.S.C. App. §460(b)(3)] "in accordance with such rules and regulations as the President may prescribe." No spe-

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[10] See also *Witmer* v. *United States, supra* at 381-382; *United States* v. *Lenhard*, 437 F. 2d 936, 937 (2d Cir. 1970); *United States* v. *Abbott, supra* at 913 n. 4; *United States* v. *Broyles*, 423 F. 2d 1299, 1306 (4th Cir. 1970); *United States* v. *St. Clair, supra* at 340-341; *United States* v. *Lamberd*, 315 F. Supp. 1362 (W.D. Mo. 1970); cf. *Brown* v. *Resor, supra; United States ex rel. Morton* v. *McBee*, 310 F. Supp. 328, 331-332 (N.D. Ill. 1970). Since the Appeal Board must state reasons for affirming a local board's denial of conscientious objector status, *a fortiori* it must state reasons for reversing a local board's decision to grant such status.

cific rules and regulations have been prescribed for appeals prosecuted by a State Director from a local board determination that a registrant is entitled to conscientious objector status. The procedures governing these appeals, consist of an unwritten, administrative practice which, as evidenced by this case, denies all semblance of procedural fairness. See also *United States* v. *Cummins, supra; Wiener* v. *Local Bd. No. 4, supra*; *Nevarez Bengoechea* v. *Micheli, supra.*

This Court has firmly declared its unwillingness to assume that delegation to an agency of a general power to prescribe rules and regulations is statutory authorization for it to adopt summary procedures.[11] The strength of the Court's resolve on this point was demonstrated in *Greene* v. *McElroy*, 360 U.S. 474, which involved the sensitive area of the Defense Department's industrial security clearance program. Cf. *Schneider* v. *Smith*, 390 U.S. 17.

The course of action followed in *Greene* was grounded on the constitutional principle, controlling in this case as well, that "where government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." 360 U.S. at 496. While agreeing with the Government that security clearance programs were authorized by the Congress and

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[11] Similarly in *Breen* v. *Selective Service Local Board*, 396 U.S. 460, the Court "rejected for several reasons" the Second Circuit's determination "that the reference in § 6(h)(1) to 'such rules and regulations as [the President] may prescribe' was an indication that Congress authorized revocation of student deferments for violations of the delinquency regulations." 396 U.S. at 464. Among those reasons was one referred to in *Gutknecht* v. *United States*, 396 U.S. 295, namely the necessity for reading such authorizations strictly to avoid serious constitutional questions relating to the sufficiency of statutory standards and the validity of the delinquency regulations on their face and as applied.

the President, operating through their respective constitutional powers, the Court found that neither the statutes nor executive orders relied upon by the Government contained specific instructions that individuals should be denied employment opportunities "in a manner which is in conflict with our long-accepted notions of fair procedures." *Id.* at 506-507. Only the "most explicit action by the Nation's lawmakers", the Court concluded, would warrant a finding that summary procedures were at least properly authorized, if not constitutionally fair. The Court ruled that such "explicit action" is required by the Constitution "not only to assure that individuals are not deprived of cherished rights" but also to prevent "decisions of great constitutional import and effect [from being] relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Id.* at 507.

The authorization contained in 50 U.S.C. App. § 460(b)(3) is no more explicit authority in this case for denying notice, an opportunity to be heard and statement of reasons than were the similarly broad delegations of power considered and found wanting in *Greene*. Furthermore, the assumption that summary procedures are authorized by statute is nowhere less acceptable than in this case, where there exists a "strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors . . ." *United States* v. *Gearey*, 368 F. 2d 144, 150 (2d Cir. 1966) *cert. denied*, 389 U.S. 959; *Blalock* v. *United States*, 247 F. 2d 615, 619 (4th Cir. 1957).

Moreover, based on this policy the Court has treated Congressional silence regarding applicable procedures in the Selective Service appellate process as not merely insufficient authorization for summary procedures, but as affirmative support for construing the Act in accordance with "underlying concepts of procedural regularity and

basic fair play." *Gonzales* v. *United States*, *supra*, at 412. This was the approach adopted in both *Simmons* and *Gonzales* which involved the procedures for Department of Justice investigation, hearing and recommendation in connection with Appeal Board consideration of conscientious objector appeals, 50 U.S.C. App. § 456(j) (1951).

Simmons held that registrants are entitled to receive a "fair resume" of any adverse evidence disclosed by the FBI investigation prior to the Department of Justice hearing. Furnishing the registrant with such a resume, the Court found, would enable him adequately to prepare and present his defense against the adverse evidence at the hearing. Because the duty to provide timely notice in the form of a "fair resume" was fully in accord "with the statutory plan and the concepts of basic fairness which underlie all our legislation" the Court found it unnecessary to decide the issue on constitutional grounds. *Id.* at 405.

Similarly, in *Gonzales*, the Court declared that since a registrant may present a statement to the Appeal Board, he had an implicit right to present an effective statement, and therefore "was entitled to know the thrust of the [Justice] Department's recommendation so that he could muster his facts and arguments to meet its contentions." 348 U.S. at 414.

While the Department of Justice procedure involved in *Simmons* and *Gonzales* was abandoned by Congress in the 1967 Act in order to streamline the appellate process, there was no intention to eliminate the basic protections afforded registrants claiming conscientious objector status. See H.R. Rep. No. 267, 90th Cong., 1st Sess. (1967), 1 U.S. Code Cong. & Adm. News 1348 (1967); *United States* v. *Lamberd*, 315 F. Supp. 1362, 1370 n. 5 (W.D. Mo. 1970).

Also, the fact that "full administrative review" remains so vital to the overall fairness of the System's

operation removes any basis for assuming that Congress has altered its determination that the appellate process itself be governed by fair and equitable procedures. Therefore, it cannot be doubted that registrants continue to be entitled to "a meaningful, thoughtful review and consideration by the Appeal Board which Congress set up for just such purpose." *Slettehaugh* v. *Tarr*, 322 F. Supp. 180, 184 (D. Minn. 1971). A "meaningful, thoughtful review" was precisely what petitioner was denied by the summary procedures employed in this case.

Unless we assume, which we do not, that *Simmons* and *Gonzales* were decided on the basis of form and not substance, it must be concluded that under those decisions petitioner and other similarly situated registrants are entitled by statute to notice of the alleged defects in their cases, any adverse recommendations by State Directors or others, and any facts of which the Appeal Boards propose to take administrative notice; to an opportunity to present their defense, through effective written statements to their Appeal Boards; and to a fair statement of reasons, so that if they choose, they may obtain meaningful, judicial review. See *United States* v. *Cummins, supra; Wiener* v. *Local Bd. No. 4, supra; Murray* v. *Blatchford, supra.* No other conclusion is possible if the Selective Service appellate process is not "to be conducted on the level of a game of blind man's buff." 348 U.S. at 405.

POINT III

There is no statutory authority for an Appeal by the State Director to the Appeal Board from a Local Board's determination that a registrant is entitled to conscientious objector status.

The Selective Service Act of 1967 provides that all determinations of a Local Board with respect to the granting or denial of exemptions or deferments are "final" except where an appeal is authorized. . . ." 50 U.S.C. App. § 460(b)(3). But the Act does not contain any specific authorization for such appeals, whether by registrants or State Directors.

Prior to 1967, the only specific statutory authorization for an administrative appeal involving a conscientious objector claim was that for an appeal by a registrant "if such claim was not sustained by the Local Board." 50 U.S.C. App. § 456(j) (1951). This provision was deleted from the 1967 Act, together with the provision for an independent Department of Justice review where such an appeal was taken.

Clearly, Congress did not intend, by its silence in the 1967 Act, to eliminate the long standing administrative practice of allowing registrants to appeal local board denials of conscientious objector claims. But nothing in this silence and lack of specific authorization should be read as Congressional approval for an unprecedented grant to a State Director of the power to appeal a local board's determination that a registrant is entitled to conscientious objector status.

There is no more appropriate case than this one in which to apply this Court's ruling that it "will construe narrowly all delegated powers that curtail or dilute" a citizen's liberties. *Kent* v. *Dulles*, 357 U.S. 116, 129; see

also *Gutknecht* v. *United States*, 396 U.S. 295; *Schneider* v. *Smith*, 390 U.S. 17. This rule of strict construction was applied in *Peters* v. *Hobby*, 349 U.S. 331 to sustain an individual's interest in finality in the administrative process. In *Peters*, the Court rejected the Government's contention that implied authorization was sufficient basis for the Civil Service Commission's Loyalty Review Board to appeal, on its own motion, an HEW loyalty board's determination that an employee was not subject to dismissal for disloyalty. The Court read the Commission's authority narrowly because the power claimed by the Commission, if sustained, would have devastating consequences for the individuals involved. Mr. Chief Justice Warren, writing for the majority, analogized the limitation of the Commission's power to appeal to that of the Government's after a verdict of acquittal has been rendered in a criminal proceeding. *Id.* at 344-345. Such a limitation was an important safeguard for the employee, because it left the initial determination of his loyalty "to his co-workers in the department—to his peers, as it were—who knew most about his character, his actions and his duties." *Id.* at 345.

A registrant's Local Board occupies a similar position in the Selective Service System. The members of the Board must, whenever possible, live within the Board's jurisdiction. They are the only representatives of the system who have close and constant contact with the registrant and will, as in this case, have the sole responsibility of personally examining a registrant's qualifications for conscientious objector status. Once the Local Board has sustained this claim, its decision should be as final as a verdict of acquittal.[12]

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[12] This does not mean that the State Director cannot request a Local Board to reopen its classification upon a showing of new evidence, or that the Board misapplied or misapprehended the law or that the registrant obtained his classification by fraud. Certainly, this would be consistent with the over-all statutory scheme, since it would permit the registrant to appear personally before the Local Board, if necessary, in response to the State Director's charges.

Assuming, *arguendo*, that there is in fact statutory authorization for the State Director's appeal from a Local Board determination that a registrant is entitled to conscientious objector status, that authorization should be construed narrowly so as to limit appeals solely to situations where the State Director specifically alleges that the Local Board departed from governing legal standards. The Appeal Board does not conduct personal interviews or hold any hearings and consequently it should be bound by and no appeal should lie from the Local Board's determination of factual issues.

POINT IV

Revocation of petitioner's conscientious objector status by fundamentally unfair and statutorily unauthorized procedures constitutes "blatantly lawless action", which § 10(b)(3) does not insulate from pre-induction judicial review.

Section 10(b)(3) declares that a decision of an Appeal Board shall be "final" and that

> "[n]o judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards or the President, except as a defense to a criminal prosecution . . . after a registrant has responded either affirmatively or negatively to an order to report for induction . . . Provided that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Literal reading of this provision is impermissible, as this Court recently made clear in *Oestereich* v. *Selective Service Local Board*, 393 U.S. 233 and *Breen* v. *Selective Service Local Board*, 396 U.S. 460. There is, for example, no doubt that § 10(b)(3), despite its specific language, does not bar registrants from resorting to post-induction

habeas corpus to challenge the validity of their classifications. 393 U.S. at 238.

Similarly, *Oestereich* and *Breen* recognize the plain injustice and possible unconstitutionality of § 10(b)(3) if it were read to require literal obedience in all cases to its ban against pre-induction judicial review. Consequently, in those cases, the Court held that where a registrant's induction order is the product of statutorily unauthorized procedures, § 10(b)(3) would not be construed to require him to submit to induction or undergo criminal prosecution to test the order's validity.

There is no more reason in this case than there was in *Oestereich* and *Breen* for reading § 10(b)(3) "with unnecessary harshness" (393 U.S. at 238), or in such a way as to "raise serious constitutional problems." (393 U.S. at 243, Mr. Justice Harlan concurring). Petitioner should not be compelled to relinquish his religious convictions by submitting to military authority or risk his liberty in a criminal prosecution in order to obtain judicial redress for deprivations of constitutionally and statutorily guaranteed procedural rights. In addition, literal application of § 10(b)(3) in this case, as in *Oestereich* and *Breen* conflicts with another express provision of the Act, namely § 6(j) in which Congress has declared that "nothing" in the Act "shall be construed to require a person to be subject to combatant training and service . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. § 456(j).

Practical considerations as well militate against a literal application of § 10(b)(3) in this case. To defer consideration of petitioner's procedural challenge, until it is raised, in all probability,[18] as a defense to a criminal

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[18] The alternative route of a post-induction writ of habeas corpus is unavailable to petitioner, who cannot, consistent with his conscientious objection, enter military service. This has been generally true of most conscientious objectors. See *United States* v. *Freeman*, 388 F. 2d 246, 248-249 (7th Cir. 1967).

prosecution, serves the interests of neither administrative efficiency nor judicial economy and is a result that one can hardly assume Congress intended.

Whatever may be the differences between the position of the majority and that of Mr. Justice Harlan in *Oestereich* and *Breen* with respect to the precise metes and bounds of § 10(b)(3), those differences are not applicable here. This case falls well within the area where both positions overlap, since, as Chief Judge Lumbard concluded, "the claim of Board 'lawlessness' Fein raises . . . [is] substantially similar to the situations in *Oesteriech* and *Breen*." (A. 106).

Both *Oestereich* and *Breen* involved a pre-induction challenge to the delinquency regulations (32 CFR § 1642.12) pursuant to which registrants were reclassified I-A from exempt or deferred status on the basis of their having surrendered possession of their draft cards as an expression of protest against the Vietnam war. In each case, it was claimed that the delinquency regulations were (i) facially unconstitutional, (ii) unauthorized by statute, (iii) in conflict with other statutory provisions, and (iv) unconstitutionally applied to penalize lawful protest. Regarding the first claim, the Court noted that serious constitutional questions were presented by the absence of sufficient standards in the delinquency regulations, but did not decide the issue because it found that the use of those regulations to reclassify registrants constituted "a clear departure by the Board from its statutory mandate." *Oestereich* v. *Selective Service Board, supra,* at 238; *Breen* v. *Selective Service Board, supra,* at 467.

On the question of § 10(b)(3), the Court held that where the validity of an induction order is challenged on the grounds that the Board has exceeded its constitutional or statutory authority and, in other words, has engaged in "blatantly lawless" conduct, pre-induction review is not precluded.

Petitioner raises precisely the same claims with respect to the summary revocation of his conscientious objector status. Nevertheless, the majority below sought to distinguish *Oestereich* and *Breen* from the present case and invoked § 10(b)(3) as a bar to pre-induction judicial review. In their opinion *Oestereich* and *Breen* apply only to cases where a registrant claims the loss of an exempt or deferred status as to which he has a "clear statutory right." (A. 101).

Nothing in *Oestereich* and *Breen* or for that matter any other decision of this Court lends support to the majority's conclusion. However, even assuming that this severely restrictive reading of *Oestereich* and *Breen* is correct, petitioner's challenge to the summary procedures employed by the Appeal Board would not be barred by § 10(b)(3).

Local Boards are empowered to "hear and determine" all claims for exemption and deferment. 50 U.S.C. App. § 460(b)(3). Classification as a conscientious objector is expressly conditioned, by statute, on the registrant's claim being "sustained by the local board". 50 U.S.C. App. § 456(j). And this determination of the Local Board is "final" unless "an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." 50 U.S.C. § 460(b)(3). Therefore, following the Local Board's determination, petitioner was vested with a "clear statutory right" to his conscientious objector classification, subject to revocation, as were the classifications in *Oestereich* and *Breen*, only in accordance with statutorily authorized and constitutionally valid procedures. In this case, as we have demonstrated, the revocation of petitioner's conscientious objector status was accomplished by summary procedures which were not authorized by statute and which, in fact, deprived petitioner of his right to a "meaningful and thoughtful review and consideration by the Appeal Board"—a right implicitly man-

dated by the Selective Service Act. *Mulloy* v. *United States, supra* at 416; *Slettehaugh* v. *Tarr, supra*. The summary procedures were also clearly in violation of the Due Process Clause of the Fifth Amendment.

It is clear, however, that the limitation placed on § 10(b)(3) in *Oestereich* and *Breen* is not confined to a single category of "blatantly lawless" conduct or to the particular factual situations involved. Rather, these decisions are expressly founded upon a fundamental and comprehensive distinction between the Board's "normal operations" involving the presumptively valid exercise of discretion or application of expertise, which are not subject to pre-induction review, and those involving a "clear departure by the Board from its statutory mandate." *Oestereich* v. *Selective Service Board, supra* at 238; *Breen* v. *Selective Service Board, supra,* at 467. In the latter category, which obviously also includes a Board's use of procedures which, on their face, are contrary to a constitutional mandate (*Oestereich* v. *Selective Service Board, supra*), pre-induction judicial review is available.

The holdings in *Oestereich* and *Breen,* therefore, unquestionably support pre-induction review of petitioner's claims since, in each case, as Chief Judge Lumbard found:

> "the registrant challenges a procedure unauthorized by statute while claiming that the regulation deprives him of a right based on higher authority . . . [I]n *Oestereich,* the conflict posed was between a board regulation—the delinquency provision—and a statutory command, the ministerial exemption. Here, the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an a fortiori case for prejudicial review," (A. 14).[14]

[14] Chief Judge Lumbard's conclusion is in accord with the rulings of a substantial majority of the lower courts which have considered this question. Indeed, some of these Courts have assumed pre-induction jurisdiction to review claims like petitioner's, involving a denial of procedurally fair consideration by an Appeal Board. See

Allowing pre-induction judicial review in this case is consistent with the basic purpose of § 10(b)(3), which is to limit judicial review in time as well as scope in order to ensure that Local and Appeal Boards will be free to exercise their discretion and expertise without the threat of "litigious interruption". *Clark* v. *Gabriel*, 393 U.S. 256, 258; *National Student Assoc.* v. *Hershey*, 412 F. 2d 1103, 1109 n. 17 (D.C. Cir. 1969); cf. *McKart* v. *United States*, 395 U.S. 185. Thus, where these boards have proceeded in a fair and regular manner, § 10(b)(3) invests their classification and processing decisions with presumptive validity, reviewable only after the registrant has submitted to or refused induction and then only as to whether the classification is entirely unsupported by any evidence.

As Mr. Justice Harlan makes clear, "these factors are significantly altered where the registrant contends that the procedure employed by the Board is invalid on its face." 393 U.S. at 241.

"In neither *Oestereich*, *Breen*, nor this case", as Chief Judge Lumbard concluded, "are there any discretionary determinations of the system involved, nor are there any factual inquiries required." (A. 108). These cases contrast with the situation involved in *Gabriel*, where

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Wiener v. *Local Bd. No. 4*, *supra*; *Murray* v. *Blatchford*, *supra*; *Slettenhaugh* v. *Tarr*, *supra*. Similarly, courts have afforded registrants pre-induction review where other basic procedural errors deprived them of their right to a full administrative review. See *Hunt* v. *Local Board No. 197*, — F. 2d — (3rd Cir. decided February 5, 1971); *Swift* v. *Selective Service Dir.*, — F. 2d — (D.C. Cir. 1971), 39 U.S. Law Week 2561; *Fallon* v. *Selective Service*, 321 F. Supp. 988 (W.D. Wis. 1971). In other cases, courts have reviewed claims that a Board failed to follow statutory requirements even though the registrant was merely seeking, and did not already possess, a deferred or exempt status. *Bowen* v. *Hershey*, 410 F. 2d 962, 963-964 (1st Cir. 1969); *Wright* v. *Selective Service Bd.*, 319 F. Supp. 509 (D. Minn. 1970). See generally, Donahue, *The Supreme Court vs. Section 10(b)(3)*, 17 U.C.L.A. L. Rev. 908 (1970).

§ 10(b)(3) was held to apply. There, no question was raised about the Board's statutory and constitutional authority to exercise its discretion in passing on a particular request for classification. Rather, the sole question was whether the evidence supported denial of Gabriel's requested classification. This undeniably called for judicial review of "a determination of fact and an exercise of judgment." 393 U.S. at 258.[15]

Unlike *Gabriel*, there is no danger of "litigious interruption" here. Resolution of petitioner's claims of procedural unfairness does not require the court to engage in a time consuming and laborious analysis of the evidence in the record supporting or detracting from his right to conscientious objector status. Petitioner's case is purely a legal one, easily resolved by reference to *Simmons*, *Gonzales*, *Greene* and a few, more general decisions by this Court on the subject of procedural due process.[16]

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[15] Gabriel's principal claim was that his 1-A classification was not supported by a basis in fact. He apparently did raise two additional contentions, that the Board misapplied the statutory standard for conscientious objector status and was motivated by hostility toward registrants who claim such status. 393 U.S. at 256. Contrary to the view of the majority below, these additional claims could not "have been passed on without inquiry into findings of fact or exercise of discretion by the local board." (A. 110, n. 4). Except in the rare case, bias or misapplication of statutory standards must be inferred from conflicting and ambiguous evidence in the administrative record. A trial to resolve factual controversies would in all probability be required. See *Donahue*, *supra* at 925; compare *National Student Assoc.* v. *Hershey*, *supra*.

It should also be noted that the additional claims in *Gabriel* do not appear to have been presented to, or considered by the district court, and therefore were not properly before this Court. See *Gabriel* v. *Clark*, 287 F. Supp. 369 (N.D. Cal. 1968).

[16] The majority below relies heavily on the summary affirmance of *Boyd* v. *Clark*, 393 U.S. 316. While it is difficult to determine precisely what was meant by the cryptic reference to *Gabriel* in *Boyd*, it is clear that the registrants in both cases claimed that their Boards

In fact, contrary to the implication in the majority opinion below (A. 97), petitioner's procedural challenge in no way calls upon a court to review the discretionary judgment of the Appeal Board as to whether it is or is not supported by a basis in fact in the record. It would be constitutionally improper and against petitioner's best interests for a court to determine that issue based on the record as it presently exists, even if this issue was raised after petitioner had refused induction. Because petitioner was denied an opportunity to present his position on the issues before the Appeal Board, the record in this case is intrinsically deficient and cannot lawfully be the basis for a final determination of petitioner's classification. As a practical matter, while petitioner cannot conceive of any legitimate basis in the present record supporting the Appeal Board's action, it certainly would be foolhardy of him not to take advantage of his procedural rights to present his side of the case to the Appeal Board and to make

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applied certain statutes or regulations discriminatorily against them. Unlike *Oestereich, Breen* and this case, *Boyd* and *Gabriel* did not raise any challenge "to the validity of the laws themselves." 393 U.S. at 244-245, n. 7 (Mr. Justice Harlan concurring). Resolution of the claims made in *Boyd* and *Gabriel* inevitably would involve difficult factual issues and therefore certainly would result in the "litigious interruption" that section 10(b)(3) was designed to avoid.

In *McKart* v. *United States, supra,* the Court referred to *Oestereich* as "a case where all administrative appeals had been exhausted." *Id.* at 199 n. 18. By contrast, the registrants in *Boyd* had not exhausted their administrative remedies, they had not been ordered for induction, and, as Chief Judge Lumbard found, they "had not reached a position of finality within the system." (A). *Boyd* therefore represents an application of the exhaustion requirements enunciated in *Estep* v. *United States,* 327 U.S. 114, 123 and *Falbo* v. *United States,* 320 U.S. 549 and embodied in § 10(b)(3). These requirements bar registrants from prematurely resorting to the courts to enjoin their induction (*McKart* v. *United States, supra* at 197), not from seeking, like petitioner, redress for deprivation of constitutional or statutory rights where there is no administrative remedy available "which might have cured or rendered moot the very defect . . . complained of in court." *McGee* v. *United States, supra,* 39 U.S. Law Week at 4572.

a complete appellate record in support of his conscientious objector status before submitting his claim to a court for final determination. See *Cox* v. *United States, supra.*

In these circumstances, where it has been found that a registrant was improperly denied his right to meet the issues at the administrative appeal level, judicial review has been assiduously restricted to the purely legal questions of procedural fairness. For example, in both *Simmons* and *Gonzales,* the briefs for the petitioners and respondents were concerned primarily with the basis in fact issue,[17] but, in both cases, the Court reached and decided only the remedial issue of procedural fairness. That the procedural question is genuinely distinct from the fact issues is clearly evidenced by the Court's rejection of the Government's harmless error contention in *Simmons*:

> "Petitioner has been deprived of a fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." 348 U.S. at 406.[18]

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[17] See e.g., *Gonzales* v. *United States,* Petition for a Writ of Certiorari, pp. 2, 22; Government's Brief in Opposition, pp. 12-15; Petitioner's Brief, pp. 27-41; Government's Brief, pp. 15-27; *United States* v. *Simmons,* Petition for a Writ of Certiorari, pp. 2, 13-14; Government's Brief in Opposition, pp. 11-14; Petitioner's Brief, pp. 7, 26-40; Government's Brief, pp. 17-31.

[18] See also *Morgan* v. *United States, supra* at 22. Lower courts faced with an Appeal Board's failure to afford a registrant an opportunity to submit his side of the case on appeal have, similarly, refused to decide the merits of the registrant's classification claim on such a one-sided record and have remanded the case to the Appeal Board with directions that it permit the registrant to file a responsive statement to complete the record. See *United States* v. *Cabbage, supra* at 1042; *Wiener* v. *Local Bd. No. 4, supra*; *Nevarez Bengoechea* v. *Micheli, supra* at 260; *United States* v. *Lamberd, supra*; *Slettehaugh* v. *Tarr, supra* at 184.

Finally, as Mr. Justice Harlan concluded, "a challenge to the administrative procedure itself not only renders irrelevant the presumption of regularity, but also presents an issue beyond the competence of the Selective Service Boards to hear and determine." 393 U.S. at 242. On the last point, it is particularly important to note that petitioner's challenge, even more so than the questions concerning the delinquency regulations presented in *Oestereich* and *Breen*, goes to the heart of the presumptive validity surrounding the Board's "classification and processing" decisions. The failure to give petitioner notice, an opportunity to respond to the issues and a statement of reasons renders the Board's decision inherently unreliable and fundamentally defective. Judicial relief in advance of completion of the administrative process has always been available, as Mr. Chief Justice Burger (then a member of the Court of Appeals for the District of Columbia) ruled "where on its face the contemplated hearing or other administrative process, if consummated, would be set aside on review on procedural grounds." *Wolf Corporation* v. *SEC*, 317 F. 2d 139, 143 (D.C. Cir. 1963); see also *Amos Treat & Co.* v. *SEC*, 306 F. 2d 260, 266-267 (D.C. Cir. 1962); *Consolidated Edison Co.* v. *McLeod*, 302 F. 2d 354, 355 (2d Cir. 1962); *Sinclair Oil Corp.* v. *Smith*, 293 F. Supp. 1111, 1115 (S.D.N.Y. 1968); and generally, Jaffe, *Judicial Control of Administrative Action*, 440-446 (1965); cf. *Leedom* v. *Kyne*, 358 U.S. 184.

POINT V

The $10,000 jurisdictional amount requirement cannot prevent assumption of jurisdiction where fundamental rights are at issue.

This Court has in recent terms on several occasions entertained the question whether the $10,000 jurisdictional amount requirement contained in 28 U.S.C. § 1331(a) is applicable in cases where fundamental federally cognizable

rights are present. Research fails to disclose that Court has squarely reached the issue.

In some instances neither this Court nor lower federal courts attempted to determine the presence of a jurisdictional amount. In *Aptheker* v. *Secretary of State*, 378 U.S. 500, where the right to passport issuance was presented and in *Schneider* v. *Rusk*, 377 U.S. 163 where the right to citizenship was at issue, this Court did not inquire whether the jurisdictional amount was satisfied. Federal courts of appeal have similarly overlooked the question in cases of constitutional dimension, *e.g.*, *Quaker Action Group* v. *Hickel*, 421 F. 2d 1111 (D.C. Cir. 1969) (injunction against picketing); *Thompson* v. *Clifford*, 408 F. 2d 154 (D.C. Cir. 1968) (right of deceased Communist veteran to burial in a military cemetery). In those cases where pre-induction review has been sought federal judges have taken a variety of positions, suggesting finally, substantial confusion over the applicability of the $10,000 amount in controversy requirement. *Wolff* v. *Selective Service*, 372 F. 2d 817, 826 (2d Cir. 1967); *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968) (Dissenting opinion of Judge Edelstein), *aff'd on other grounds*, 393 U.S. 316; *Murray* v. *Vaughn*, 300 F. Supp. 688 (D.R.I. 1969); *Berk* v. *Laird*, 429 F. 2d 302 (2d Cir. 1968); *Moylan* v. *Laird*, 305 F. Supp. 551, 553 (D.R.I. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969).

Resolution of the issue must come in the context of the reasonable interests of the federal system and the nature of the right asserted by litigants. Petitioner acknowledges, in an era when the federal courts have increasingly become the forum for redress of constitutional grievances, that there should not be intrusion by federal courts beyond the "rightful independence of state governments", by adjudicating controversies that should be determined by state courts. *Healy* v. *Ratta*, 292 U.S. 263, 269-70. Petitioner similarly acknowledges that "petty"

cases, i.e., those in which nominal property rights as opposed to those of life and liberty are in dispute, are not appropriate to federal jurisdiction. *Giancana* v. *Johnson*, 335 F. 2d 366, 368-369 fn. 7 (7th Cir. 1964); S. Rep. No. 1830, 85 Cong., 2d Sess. 1958, 1958 U.S. Code, Cong. & Adm. News, pp. 3099-3101. Neither of these interests of federalism are presented by petitioner, nor are they relevant in any case in which a Selective Service registrant or in-service military personnel seek to use the federal courts as a forum to consider violations of fundamental fairness.

The alternative to federal court jurisdiction in cases such as petitioner's are stark. Either the courts of fifty states would (if, indeed, they have jurisdiction themselves) be called upon to "adjudicate claims involving the most delicate question[s] of federal constitutional law", *Cortright* v. *Resor*, — F. Supp. — 70 Civ. 909 (E.D.N.Y. 1971), or substantive rights, in the absence of a "forum and procedure for [their] vindication", *supra*, — could not be remedied, creating a constitutional problem of overwhelming proportion. Neither alternative is acceptable.

There is serious doubt that state courts have power to grant injunctive relief against federal officials. See *Armand Schmoll, Inc.* v. *Federal Reserve Bank*, 286 N.Y. 503, 37 N.E. 2d 225 (1941) *cert. denied*, 315 U.S. 818; *Wasservogel* v. *Meyerowitz*, 300 N.Y. 125, 89 N.Y. 2d 712 (1949); Arnold, *The Power of State Courts to Enjoin Federal Officials*, 73 Yale L. J. 1385 (1964); Comment, *Draft Reclassification for Political Demonstrations—Jurisdictional Amounts in Suits Against Federal Officers*, 53 Cornell L. Rev. 916 (1968). Assuming however, state court jurisdiction was present, respondent would have the power to remove to the federal courts, 28 U.S.C. 1442(a). That such an alternative would be exercised appears such a certainty as not to warrant argument. If, however, respondents chose not to remove the cause, then "whatever

mischief is to be expected from interference by federal courts in military matters would be many times compounded by litigations in fifty state court systems", *Cortright* v. *Resor*, *supra*, p. 36.

The government has argued that "Congress has conditioned access to the federal courts on a litigant's ability to establish that his dispute involved a minimum monetary amount and [that] the federal courts may not ignore this requirement even though it may necessitate rejection by them of civil cases that otherwise bring into question significant federal rights." Government's Brief in Opposition to Petition for Certiorari, *Fein* v. *Selective Service*, No. 1129 October Term 1970, p. 7. If the government is correct in this assertion, then federal courts, which have been granted jurisdiction pursuant to 28 U.S.C. §§ 1343-1983 over state action and state officials regardless of the amount in controversy, *e.g.*, *Eisen* v. *Eastman*, 421 F. 2d 560-564 (2d Cir. 1969), would not have jurisdiction over their own officials. On the other hand they would of necessity (unless they argue that there is neither a state nor a federal forum available although a "significant federal right" is present) say that state courts have jurisdiction over federal officials. It is not possible that the federal statutory scheme, and particularly 28 U.S.C. §§ 1337, 1339, 1340, 1343, 1344, 1346, 45 U.S.C. § 51 *et seq.*, 46, U.S.C. 688, be read consistently with such a singular and anomalous result, particularly where federal constitutional rights are present.

The more compelling and enduring question presented by petitioner and not reached by the court in *Boyd* v. *Clark*, 287 F. Supp. 561, 567-69 (S.D.N.Y. 1968) *cert. denied* 393 U.S. 316, is whether a 19th century notion of property rights can be exalted over fundamental issues of life and liberty by depriving a litigant who has been processed in the manner petitioner has by a federal administrative

agency, of a federal forum. Judge Edelstein has put the question in its baldest perspective:

> "If a man can sue in federal court on the allegation that the government is injuring his property, he certainly must be allowed to sue on the allegation that the government is oppressing him personally. Although it might be said human rights are incapable of valuation and hence valueless, it is better to view them as incapable of valuation but only because they are of infinite value. The latter view is, in my humble opinion, the only view compatible with the commitment of our nation to a belief in the dignity of man and the inherent worth of a free individual in a free society."[19] *Id.* at 568.

In simple, a monetary price cannot be placed on constitutionally guaranteed rights because they are of infinite value and concern and do not conform to the property notion of valuation in monetary amount. *Cortright* v. *Resor, supra; Murray* v. *Vaughn, supra; Berk* v. *Laird, supra; Moylan* v. *Laird, supra; Walsh* v. *Local Board No. 10, supra; Faulkner* v. *Clifford,* 289 F. Supp. 895, 899-901 (E.D.N.Y. 1962); Hart & Wechsler, *The Federal Courts and the Federal System,* 312; ALI, *Study of the Division of Jurisdiction Between State and Federal Courts,* 24, 172-76 (1969); Wright, *Law of Federal Courts,* 108-110 (2d ed. 1970); Friedenthal, *New Limitations on Federal Jurisdiction,* 11 Stan. L. Rev. 213, 216-218 (1959);

---

[19] Chief Judge Lumbard, dissenting below, although not finding it necessary to reach the question because of the clear ability of petitioner to sustain his allegation of jurisdictional amount found that he:

> ". . . need not consider the case of a poor man who stands to lose nothing but his most precious personal liberties if the unconstitutional actions of the federal government are beyond the reach of the courts. But if that case ever comes before us, I have grave doubts that the old rule requiring the claimed deprivation be capable of monetary valuation would long endure." (A. 113)

Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216, 225-26 (1948); Note, *Draft Reclassification for Political Demonstrations—Jurisdictional Amount in Suits Against Federal Officers*, 53 Cornell L. Rev. 916 (1968).

In any event, this cause cannot be dismissed for lack of jurisdiction since petitioner acknowledgedly can sustain his jurisdictional allegation, *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288. It could however, be remanded, consistent with the actions of this Court in *Oestereich, supra.* An examination of the aftermath of this Court's decision in *Oestereich* in this connection is instructive. Following this Court's remand to the District Court for examination of the *bona fides* of Oestereich's jurisdictional allegations, the government did not canvass to determine whether the amount could be met but rather stipulated both to a discontinuance of the action and restoration of Oestereich's exempt classification. While it is clear there may have been other considerations unrelated to jurisdiction which led to this decision by the government, it is symptomatic of the low and casual regard with which the $10,000 amount requirement is viewed. It has become a tool unevenly applied in selective situations to deny access to a forum for adjudication of rights where a vigorous federalism commands government supporting vindication of those rights.

CONCLUSION

For the reasons stated above, the judgment below should be reversed with instructions to the Court of Appeals that it direct the District Court to enter an order restoring petitioner to his conscientious objector status pending compliance by the Selective Service Appeal Board with the requirements of procedural due process.

Respectfully submitted,

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Dated: May 21, 1971

Appendix

Military Selective Service Act of 1967

§ 10(b)(3) 50 U.S.C. App. § 460(b)(3)

No judicial review shall be made of the classification or processing of any registrant by a Local Board, Appeal Board, or the Presidential Appeal Board except as a defense to a criminal prosecution. . . .

28 U.S.C. § 1331(a)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Selective Service Regulations

32 CFR

1626.1 *Appeal by Director and State Director.*—Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State may appeal from any determination of a local board at any time.

1626.11 *How Appeal to Appeal Board is Taken.*—(a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal.

1626.12 *Statement of Person Appealing.*—The person appealing may attach to his appeal a statement specifying

the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

1626.24 *Review by Appeal Board.*

• • •

(b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions.

1627.1 *Who May Appeal to the President From Any Determination of an Appeal Board.*—(a) When either the State Directors of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of an appeal board. He may take such an appeal at any time.

1627.3 *Appeal to President.*—When a registrant has been classified by the appeal board and one or more members of the appeal board dissented from that classification, the registrant, any person who claims to be a dependent of the registrant, or any persons who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant may appeal to the President within 30 days after the mailing by the local board of the Notice of Classification (SSS Form 110) noti-

fying the registrant of this classification by the appeal board. The local board may permit any person who is entitled to appeal to the President under this section to do so, even though the 30-day period for taking an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such 30-day period was due to lack of understanding of the right to appeal or to some other cause beyond the control of such person.

Portion of Affidavit of Petitioner Read in Support of Motion for Injunction and Declaratory Judgment.

"(a) War in any form violates the fundamental religious and moral precept that man must live in his community always conscious of the individual value of each human being and that, in addition, war curbs and extinguishes rather than expands man's potential for functioning and good.

"(b) In the code of human relations all religions find their common ground and the substance of my beliefs stems from the common foundations of all religions. The value of theology in this regard is of particular importance in distinguishing the credal differences between religions.

"(c) The sources which shaped my beliefs and have molded my training were my parents, from whom I gained the basis spiritual approach to life, the Lutheran Church, from which I grasped the concepts of equality of man before God and the singular value of each individual human being to God, the civil rights movement, which was my first experience in non-violent principles and tactics in effecting social change, and from the practice of medicine which served in large measure as an extension of the practical training which began in the civil rights movement. In medicine I found a vocational way of expressing my spiritual and moral values and it is has presented me with a new training ground for the practice of my beliefs.

"(d) There was no circumstance in which I could envisage participation in society's use of force for any reason with the limitation that, while I do not know how I would react if violently attacked myself, it is conceivable that my response might be to disarm an opponent. This individual limitation relates merely to a unique situation which I have never in fact encountered and is not generalizable to nation-states and war." (16a-17a)

Supreme Court, U.S.
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JUN 4 1971
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70 - 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted]

OLIVER T. FEIN,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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IN THE

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OCTOBER TERM, 1970

No. 1129

OLIVER T. FEIN,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus*

For half a century the American Civil Liberties Union has defended the fundamental protections set out in the Bill of Rights. In particular, it has represented those who have asserted the rights of conscience and religious liberty protected by the First Amendment and the right to due process of law as guaranteed by the Fifth Amendment, against governmental infringement. The ACLU is now heavily engaged in the representation of young men charged with

* Written consents by the attorneys for both parties have been filed with the Clerk.

alleged violations of the draft laws, or who are seeking redress from illegal actions of the selective service system through affirmative litigation. This case is closely related to a number of prior civil actions litigated by the ACLU: *Oestereich* v. *Selective Service,* 393 U.S. 233 (1968); *Breen* v. *Selective Service,* 396 U.S. 460 (1970); *Wolff* v. *Selective Service,* 372 F.2d 817 (2nd Cir. 1967). Amicus believes that the decision of the court below is in conflict with these cases and if affirmed would undermine much of the law announced by those cases.

One Federal Court has recently stated that "Those entrusted with the awful power of conscripting the nation's young men into the armed forces in time of war or other military venture owe a duty of the most searching examination of the facts, scrupulous fairness, sensitive care, compassionate hearing, patient consideration, cautious action and deliberate and rational decision within the law. We afford no less to the worst criminal in our society." *Walsh* v. *Local Board No. 10,* 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969).

We file this brief in order to present to the Court our arguments of law which support those principles.

Questions Presented

1. Whether the Court below erred in holding that Sec. 10(b)(3) of the Military Selective Service Act of 1967 barred the instant action?
2. Whether the Selective Service System's appellate administrative scheme, as utilized in this case, violates the due process clause of the Fifth Amendment?
3. Whether petitioner failed to sustain the jurisdictional prerequisite of 28 U.S.C. §1331?

Statement of the Case

After enjoying classification as a student (II-S) and later deferment in class II-A as an intern in pediatric medicine, petitioner, while still classified II-A, filed with his local board in September of 1967 an application for classification as a conscientious objector, I-O. The claim fell *prima facie* within the standards set down by this Court in *United States* v. *Seeger*, 380 U.S. 163 (1965), and *Welsh* v. *United States*, 398 U.S. 333 (1970).[1] On November 15, 1967, petitioner was retained in class II-A, the lowest classification for which he was eligible. See 32 C.F.R. §1623.2. Subsequently, at the expiration of petitioner's eligibility for a II-A classification, the local board did classify him I-O in May, 1968.

On June 4, 1968 petitioner received letters from both his local board and the State Director advising him that the latter intended to appeal the Local Board's determination that he was a conscientious objector. Immediately upon notification petitioner wrote both to the Local Board and to the Appeal Board, requesting:

> (a) a statement of reasons for the State Director's appeal,
>
> (b) notification of the standards to be applied on appeal,
>
> (c) advice as to whether any additional information other than that contained in his selective service file was to be presented to the Appeal Board,

---

[1] Petitioner had also submitted letters from persons who knew him attesting to his sincerity.

(d) an opportunity to rebut any statement of reasons or findings by the State Director as to the propriety of his conscientious objector classification.

Although he requested this information on at least two occasions petitioner never received a meaningful response. Rather, on June 20, 1968, the State Appeal Board merely reclassified him I-A by vote of 4-0 without any statement of reasons.

On July 31, 1968, Petitioner was ordered to report for induction. However, on September 16, 1968, the National Director of Selective Service took an appeal, on petitioner's request, to the Presidential Appeal Board, thus effectively cancelling petitioner's induction order. 32 C.F.R. §1627.8.

On November 26, 1961, the Presidential Appeal Board, without a statement of reasons, upheld the action of the State Appeal Board and retained petitioner in class I-A.

On February 10, 1969, petitioner filed suit in the District Court, seeking a judgment declaring the Selective Service appellate regulatory scheme unconstitutional as violative of due process and sought an order enjoining respondents from ordering petitioner's induction and restoring his I-O status.

Respondents moved to dismiss the complaint on April 8, 1969, on the grounds, *inter alia*, that the District Court had no jurisdiction pursuant to Section 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. §460(b)(3). Following briefing and oral argument, the District Court denied petitioner's application on the grounds that Section 10(b)(3) was a bar to the assumption of jurisdiction.

On July 23, 1970, the United States Court of Appeals for the Second Circuit affirmed. 430 F.2d 376. The majority sustained the District Court's finding of the applicability of Section 10(b)(3) as a bar to pre-induction review. Judge Hays concurred, finding in addition that petitioner's failure to establish the jurisdictional amount under 28 U.S.C. §1331(a) deprived the court of subject matter jurisdiction. 430 F.2d at 380.

Chief Judge Lumbard, in dissent, found that the exception to §10(b)(3) carved out by this Court in *Oestereich* v. *Selective Service Local Board No. 11* and *Breen* v. *Selective Service* was applicable and that the jurisdictional amount was satisfied by petitioner's allegations and further that the actions of the State Director and the Appeal Board and the Selective Service System's appellate regulatory scheme failed to meet minimum standards of fairness. 430 F.2d 380-388. Judge Lumbard further noted the possibility that the Appeal Board had utilized information outside of the record in petitioner's Selective Service file and might have indulged in an unwarranted political inference that petitioner's activities as a doctor in a clinic sponsored by the Students for a Democratic Society disqualified him from status as a conscientious objector. 430 F.2d at 386-387, fn. 10.

ARGUMENT

I.

Since the statute in question should be construed to afford petitioner those procedural rights which he sought to assert, respondents' failure to comply with his requests was a violation of the statute and thus constituted the kind of "lawless" action this Court has held attackable by pre-induction judicial review.

As this Court has repeatedly reminded litigants, "it is a cardinal principle" to construe statutes in such a way as to avoid striking them down due to constitutional infirmities. *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932); *United States* v. *Seeger,* 380 U.S. 163 (1965); *Welsh* v. *United States,* 398 U.S. 333 (1970); *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341 (1936) (Brandeis, *J.,* concurring). Thus, if it can be shown that respondents were under a statutory or regulatory obligation to supply petitioner with the requested information, we need not reach the question of whether §10(b)(3) bars pre-induction review of the constitutional arguments presented by this case, since under the majority opinion in *Oestereich* v. *Selective Service,* 393 U.S. 233 (1968), blatant disregard of a statutory mandate is clearly attackable by a pre-induction suit. E.g. see *Carey* v. *Local Board,* 412 F.2d 71 (2nd Cir. 1969).

Sec. 10(b)(3) of the Military Selective Service Act of 1967, is the statutory warrant for the establishment of appeal boards (as well as the statutory provision which circumscribes judicial review):

> The President is authorized to create and establish within the Selective Service System civilian local

> boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the . . . classification . . . of persons registered under this title . . . local boards, or separate panels thereof . . . shall, under such rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title of all individuals . . . The decisions of such local board shall be final, except where an appeal is authorized *and is taken in accordance with such rules and regulations as the President may prescribe* . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President . . . the determination of the President shall be final. (Emphasis added.)

Thus, it is clear that local and appeal boards "are creatures of the Selective Service Act."[2] The perimeters of their jurisdiction are confined and their operating procedures defined by "such rules and regulations as the President may proscribe." §10(b)(3). See 32 C.F.R. §§1624, 1625, 1626 and 1627. It follows that activities engaged in, or procedures followed by appeal boards which exceed their statutory warrant or which are in conflict with or are at variance with the statute or the regulations promulgated for their operation by the President, are legal nullities

[2] *Hunt* v. *Local Board*, 438 F.2d 1128, 1131 (3rd Cir. 1971) (en banc) (Gibbons, *J.*, concurring).

and without legal basis, and therefore "basically lawless." As the District of Columbia Court of Appeals has stated in *Swift* v. *Selective Service,* 3 SSLR 3839 (D.C. Cir. 1971) ". . . courts have pre-induction jurisdiction over a claim that a local board acted in plain contravention of the governing law . . ." 3 SSLR at 3843.[3] This rationale has been applied in a number of cases. See *Hunt* v. *Local Board, supra* (J.J. Gibbons and Hastie, concurring). *Walsh* v. *Selective Service,* 305 F. Supp. 1274 (S.D.N.Y. 1969); *Murray* v. *Blatchford,* 307 F. Supp. 1038 (D.R.I. 1969); *Murray* v. *Vaughn,* 300 F. Supp. 688 (D.R.I. 1969) (deprivation of entitlement to occupational deferment involving First and Fifth Amendment violations held attackable on pre-induction review); *Wiener* v. *Selective Service,* 302 F. Supp. 266 (D.Del. 1969) (denial of interview with government appeal agent and right to state director's reasons for adverse appeal); *Itzcovitz* v. *Selective Service,* 301 F. Supp. 168 (S.D.N.Y. 1969) (right to treaty exemption); *Vasquez* v. *Attorney General,* 433 F.2d 516 (D.C. Cir. 1970); *Brinton* v. *Local Board,* 322 F. Supp. 972 (D. Del. 1971) (pre-induction attack on assignment of lottery number); *Falcon* v. *Selective Service,* 434 F.2d 859 (3rd Cir. 1970) aff'g 319 F. Supp. 1355 (W.D.Penn. 1970) (pre-induction attack on allegedly statutorily invalid induction order); *Wright* v. *Local Board,* 319 F. Supp. 509 (D.Minn. 1970) (denial of statutorily mandated fatherhood deferment); *Slettehaugh* v. *Tarr,* 322 F. Supp. 180 (D.Minn. 1971) (failure of appeal board to consider deferment application); *Whitmore* v. *Tarr,* 318 F. Supp. 1279 (D.Neb.

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[3] Within this context, ". . . whether law involves statute . . . or regulation is as irrelevant as whether it involves an 'exemption' or a 'deferment' ". *Shea* v. *Mitchell,* 421 F.2d 1162, 1165-1166 (D.C. Cir. 1970); *Breen* v. *Selective Service,* 396 U.S. 460 (1970).

1970); *Germonprez* v. *Selective Service*, 318 F. Supp. 829 (D.D.C. 1970).

Judge Freedman of the Third Circuit, concurring in *Hunt, supra*, phrased the nature of "lawless" conduct which gives rise to a pre-induction attack this way:

> The characterization in Oestereich of the conduct of a board which justifies pre-induction judicial intervention as "blatantly lawless" [cite omitted] is intended as a description of a clear cut error of law. It does not require an intentional defiance of the law. 438 F.2d at 1138.

These cases may therefore be characterized as representative of those classes of cases which hold that pre-induction review is always available when the Selective Service System acts beyond or contrary to the statute which gives it life and/or the regulations which make it function.[4]

The question then becomes one of statutory analysis. If the Military Selective Service Act of 1967 required petitioner to be afforded those due process rights which he requested, the appeal board's failure to supply them, permits pre-induction review. *Hunt* v. *Local Board, supra; Murray* v. *Blatchford, supra; Wiener* v. *Local Board, supra;*

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[4] See generally, Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 Mich. L. Rev. 55 (1970); Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues*, 17 U.C.L.A. L. Rev. 908 (1970). See also Sec. II, *infra*, for a discussion of the multitude of additional cases discussing the applicability of 10(b)(3) where a purely legal or constitutional question other than a statutory or regulatory violation is alleged. Cf. *Oestereich, supra*, 393 U.S. at 239 (Harlan, J., concurring).

Edwards v. *Local Board,* 313 F. Supp. 177 (D. Colo.), aff'd, 408 F.2d 944 (10th Cir. 1969);[5] *Slettehaugh* v. *Tarr, supra.*

B. The Statute's Requirement.

Every judicial circuit in the United States save one has held that local boards and appeal boards are required to state the reasons for rejecting a registrant's prima facie claim for deferment.[6] While the circuit courts of appeal have differed somewhat in their basis for the formulation of this rule, at least two circuits and several district courts have held that such a requirement is mandated by the statute and regulations.

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[5] There are a large number of cases holding that the question of pre-induction judicial review "is inextricably intertwined with the merits of the controversy." *Zerillo* v. *Local Board,* 3 SSLR 3861 (8th Cir. 1971). See also *Lane* v. *Local Board,* 3 SSLR 3759 (1st Cir. 1971); *Bowen* v. *Hershey,* 410 F.2d 962 (1st Cir. 1969); *Ferrel* v. *Selective Service,* 434 F.2d 686, 687 (2nd Cir. 1970) ("the issues have a tendency to merge"); *Carey* v. *Local Board,* 412 F.2d 71 (2nd Cir. 1969); *Hunt, supra* (J. Aldisert, dissenting); *Nestor* v. *Hershey,* 425 F.2d 504, 511 (D.C. Cir. 1969); *Swift* v. *Director of Selective Service,* 3 SSLR 3839 (D.C. Cir. 1971); *Edwards* v. *Selective Service System,* 432 F.2d 287, 293 (5th Cir. 1970); *Gregory* v. *Tarr,* 436 F.2d 513 (6th Cir. 1971) cert. pending No. 1129, Oct. Term 1970; *Foley* v. *Hershey,* 409 F.2d 827 (7th Cir. 1969); *Liese* v. *Local Board,* 3 SSLR 3860 (8th Cir. 1971); *Evans* v. *Local Board,* 425 F.2d 323 (10th Cir. 1970). Only the Ninth Circuit appears to have steadfastly refrained from any examination of the merits in pre-induction suits. See *Peterson* v. *Clark,* 411 F.2d 1217 (9th Cir. 1969), cert. den. 399 U.S. 928, reh. den. 400 U.S. 855 (1970); *Bookout* v. *Thomas,* 430 F.2d 1343 (9th Cir. 1970). These cases, excepting the Ninth Circuits appear to strongly support the thesis put forth by Justice Harlan in his concurrence in *Oestereich.* Compare, *Hunt, supra* and the later opinion of the Third Circuit in *Morgan* v. *Melcher,* —— F.2d ——, No. 18,697 (3rd Cir., May 5, 1971). See also *Rheingans* v. *Mitchell,* 438 F.2d 345 (9th Cir. 1970).

[6] See Section II, pp. 15-16, *infra.*

32 C.F.R. §1626.12 permits a registrant to file a rebuttal statement addressed to the appeal board directing the board's attention to any information in the file " . . . which he believes the local board has failed to consider or give sufficient weight". If, as here, the file is barren of any reason other than a conclusory statement such as that contained in the State Director's letter to Fein (see p. 6, fn. 2, Petitioner's Brief), devoid of any stated factual basis for the local board's negative decision,[7] it is virtually impossible for a registrant to take meaningful advantage of the provisions of 32 C.F.R. §1626.12.

In *Gonzales* v. *United States*, 348 U.S. 407, this Court recognized that the failure of the Selective Service System to supply a registrant with a copy of the Department of Justice's recommendation to his appeal board regarding his claim for a conscientious objector deferment, unconstitutionally deprived him of an opportunity to rebut any adverse evidence contained therein. The Court, relying on its two prior decisions in *Simmons* v. *United States*, 348

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[7] This case is clearly distinguishable from the Second Circuit's prior decision in *United States* v. *Morico*, 415 F.2d 138 (2nd Cir. 1969) vacated on other grounds, 399 U.S. 526 (1970), where the Court found that:

> "There was sufficient evidence in the file for appellant to determine the basis for the denial of his claim for conscientious objector status both on the local board level and on the appeal board level . . . in effect appellant had at his disposal the reasons and bases for the denial of his claim." 415 F.2d at 143.

The Court of Appeals further found that he in fact did write a response to the Department of Justice recommendation which was considered by the Appeal Board. Cf. *Simmons, supra* at 405:

> "The remarks of the hearing officer at most amounted to vague hints . . . Congress in providing for a hearing did not intend for it to be conducted on the level of a game of blindman's buff. The summary was inadequate and the hearing . . . was therefore lacking in basic fairness."

U.S. 397 (1955) and *United States* v. *Nugent*, 346 U.S. 1 (1953), held that,

> The right to file a statement . . . includes the right to file a meaningful statement . . . with awareness of the . . . arguments to be countered. 348 U.S. at 415.

Prior to the amendment of the Act in 1967, the Department of Justice investigation and compilation of an impartial dossier provided "a special protection for conscientious objectors." *Blalock* v. *United States*, 247 F.2d 615, 619 (4th Cir. 1957). In 1967 however, the Act was amended to eliminate this procedure to reduce delays in the processing of conscientious objector claims. H.R. Rep. No. 267, 90th Cong., 1st Sess. (1967); 1 U.S. Code Cong. and Admin. N.S. 1348 (1967). However, as Judge Weinstein has pointed out in *United States* v. *St. Clair*, 293 F. Supp. 337, 342 (E.D.N.Y. 1968):

> There was no intention to eliminate protections for those claiming conscientious objector status.

Judge Weinstein then went on to declare:

> No advocate can persuasively assert grounds for reversal when the bases for the decision below are unknown. The right of appeal from an administrative decision, *guaranteed by the regulations*, [1626.12] was in effect denied. *Id.* at 345 (emphasis added).

Accord, *U. S.* v. *Lamberd*, 315 F. Supp. 1362 (W.D. Mo. 1970). Cf. *United States* v. *Jagla*, 3 SSLR 3541, 3542 (N.D. Cal. 1970).

Following Judge Weinstein's lead in *St. Clair*, both the Third and Fourth Circuits have recognized that both the

statute and regulations, despite the elimination of the Department of Justice hearing procedures, continue to require a board to inform a registrant of the reasons for its denial of his *prima facie* claim.[8]

In *United States* v. *Broyles*, 423 F.2d 1299, 1306 (4th Cir. 1970), the Court rejected the government's contention that the Act no longer requires statements of reasons to the registrant:

> It is argued that in revising 50 U.S.C.A. App. §456(j) Congress gave full consideration to the reported recommendations of the President's National Advisory Commission on Selective Service, chaired by Mr. Burke Marshall, and published March 6, 1967. 1 U.S. Code Congressional and Administrative News, 90th Cong., First Sess. (1967) pp. 1308, 1309, 1348. It is said that this report suggested that in conscientious objector cases local boards be required to disclose the basis for a decision adverse to the registrant. This suggestion was not enacted into law, but we are referred to no legislative proceedings explaining the rejection. The argument concludes that Congress intended that a local board not be required to articulate its basis of decision.
>
> Absent a complete explanation of why the Marshall suggestion was not adopted, inaction is weak evidence of legislative intent. With equal persuasiveness, it

[8] We agree with the decision of the First Circuit in *United States* v. *Findley*, 3 SSLR 3836 (1971) that to be entitled to a statement of reasons one must at least make out a prima facie case. Or, as Judge Aldrich has phrased it, ". . . if the defendant did not even have openers we clearly wonder how or why he could get into the play. See Mulloy v. United States, 398 U.S. 410, 416." *Findley, supra* at n. 1.

may be argued conversely that Congress did not adopt the suggestion because it was deemed superfluous. Section 10 of the Act, 50 U.S.C.A. App. §460, grants to local boards the power "to hear and determine" all claims of exemption; it permits the establishment of administrative appeals; and it authorizes judicial review to determine if there is "no basis in fact" for the classification assigned a registrant. Implicit in the concept of a "hearing" granted by the statute, and the right, albeit limited, of judicial review is the opportunity to know the issues so that these procedures are not empty gestures. Indeed, once judicial review is granted, basic fair play requires that the parties and the reviewing court have disclosed to them that which is to be reviewed. United States v. Nugent, supra; Gonzales v. United States, supra; United States v. Owen, 415 F.2d 383 (8th Cir. 1969); Brewer v. United States, 211 F.2d 864 (4 Cir. 1954). We are unpersuaded by the argument of negative legislative intent and conclude *that the Act requires* the result we have reached. (Emphasis added.)

Accord, *United States* v. *Speicher*, 3 SSLR 3850, 3851 (3rd Cir. 1971). See also *O'Brien* v. *Resor*, 423 F.2d 592, 598-599 (4th Cir. 1970). Compare *United States* v. *Deans*, 436 F.2d 596 (3rd Cir. 1971).

Thus, since Sec. 10(b)(3) and 32 C.F.R. §1626.12 are properly construed as continuing to require protections equivalent to those provided prior to 1967, it follows that the failure to afford these protections to Fein was a patent violation of the statute making this case clearly subject to

pre-induction review under *Oesterech*. This analysis makes it unnecessary to reach the question whether §10 (b)(3) bars pre-induction review of purely constitutional or legal questions which are beyond the power of the Selective Service System to resolve.

II.

The refusal of the State Director to divulge the reasons for his appeal of petitioner's I-O classification and the absolute refusal of the State Appeal Board to state its reasons for denying him classification as a conscientious objector deprived petitioner of due process, and such actions by the Selective Service System were subject to pre-induction review.

It is now a well settled principle of selective service law that boards must state the reasons for refusing to grant a registrant classification as a conscientious objector once he has made out a *prima facie* claim. Indeed, each of the eleven circuits have spoken on the issue though they have differed somewhat in their formulation of the reasons for such a requirement. The need for articulation of reasons is threefold.

First, registrants must be afforded, as a statutory requirement or as a matter of due process, the basic opportunity to know the grounds upon which his claim is denied. *United States* v. *Speicher*, 3 SSLR 3850 (3rd Cir. 1971); *United States* v. *Broyles*, 423 F.2d 1299 (4th Cir. 1970) (*en banc*); *United States* v. *Washington*, 392 F.2d 37, 39 (6th Cir. 1968); *DeRemer* v. *United States*, 340 F.2d 712, 718 (8th Cir. 1965). See also *United States* v. *St. Clair*, 293 F. Supp. 337 (E.D.N.Y. 1968); *United States ex rel.*

Morton v. *McBee*, 310 F. Supp. 328, 332 (N.D. Ill. 1970); *United States* v. *Lamberd*, 315 F. Supp. 1362 (D. Mo. 1970); *United States* v. *Jagla*, 3 SSLR 3541, 3543 (N.D. Cal. 1970). See generally *Gonzales* v. *United States*, 348 U.S. 407, 415 (1955).

Second, it is virtually impossible for an appeal board to pass intelligently upon the decision of a local board when it cannot be sure of the basis for the lower board's action. *Speicher, supra.* Cf. *United States* v. *Crownfield*, 3 SSLR 3833 (3rd Cir. 1971).

Third, as the majority of Circuits have held, it is impossible for a court to engage in meaningful judicial review if no reasons are stated by the board. *United States* v. *Lenhard*, 437 F.2d 936 (2nd Cir. 1970); *Scott* v. *Commanding Officer*, 431 F.2d 1132, 1137 (3rd Cir. 1970); *Broyles, supra*; cf. *Kessler* v. *United States*, 406 F.2d 151, 156 (5th Cir. 1969); *Washington, supra*; *United States* v. *Lemmens*, 430 F.2d 619 (7th Cir. 1970); *Caverly* v. *United States*, 429 F.2d 92 (8th Cir. 1970); *United States* v. *Haughton*, 413 F.2d 736 (9th Cir. 1969); cf. *United States* v. *Pacheo*, 433 F.2d 914 (10th Cir. 1970). See also *United States* v. *Cassarino*, 314 F. Supp. 813 (D.N.H. 1970); *United States* v. *Prince*, 310 F. Supp. 1161 (D. Me. 1970); and see also *United States* v. *Atherton*, 430 F.2d 741 (9th Cir. 1970). Compare *United States* v. *Curry*, 410 F.2d 1297 (1st Cir. 1969); *Gruca* v. *Sec. of the Army*, 436 F.2d 239, 245 (D.C. Cir. 1970).

Having discussed the statutory requirement in Point I, *supra*, we turn to an examination of the due process issue both as it relates to the registrant and the reviewing courts. That is, whether the failure of the State Director and the State Appeal Board to supply petitioner with reasons and

a statement of the standards to be used by the board in reviewing his case after the state director's appeal, coupled with the National Appeal Board's failure to state its reasons for affirming the State Board's equally silent decision, was a deprivation of due process subject to pre-induction review.

A. The Nature of the Liability Imposed on Both Petitioner and a Reviewing Court.

In *Gonzales* v. *United States,* 348 U.S. 407 (1955) this Court stated that:

> Just as the right to a hearing means the right to a meaningful hearing, *United States* v. *Nugent,* supra; *Simmons* v. *United States,* supra, so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered. 348 U.S. at 415.

In *United States* v. *Speicher,* 3 SSLR 3850, the Third Circuit stated:

> [k]nowledge of the basis for the Local Board's action is as essential today for the filing of a meaningful statement with the Appeal Board as knowledge of the Justice Department's recommendation was before the 1967 amendments. Recently the unanimous Court said:
>
> "Because of the narrowly limited scope of judicial review available to a registrant, the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System." *Mulloy*

v. *United States*, 398 U.S. 410, 416 (1970). 3 SSLR at 3851. See also *United States* v. *Lamberd*, *supra* at 1372, 1374.

Additionally, unless a Local Board gives reasons for its decision, it will not be possible for the Appeal Board intelligently to review the Local Board's decision. Again the Court in *Speicher* recognized that:

> Full administrative review in 1955 included the opportunity to respond to written recommendations.' Gonzales v. United States, supra. In 1970 it can mean no less than that the Appeal Board be informed of the basis for the Local Board's action . . . The Appeal Boards are no more entitled to speculate as to the basis for Local Board action than are reviewing courts. *Ibid.*

Furthermore, in order for there to be judicial review, a court must be able to ascertain the reasons upon which an Appeal Board has denied a prima facie claim for deferment. See *Scott* v. *Commanding Officer*, 431 F.2d 1132 (3rd Cir. 1970) and *United States* v. *Crownfield*, 3 SSLR at 3854, n. 2.

In *Crownfield, supra*, the Third Circuit held:

> The purpose of our holding in *Scott*, supra [that the rejection of a registrant's prima facie case for conscientious objector status without any statement of reasons vitiates the legality of his induction order. Id. 3833], as stated in that opinion, is to ensure meaningful judicial review of administrative action by requiring that the court have some idea of the basis for the

> decision of a local or appeal board . . . the requirements of Scott go to the very essence of judicial review. 3 SSLR 3834-5.

In *United States* v. *St. Clair*, 293 F. Supp. 337 (E.D.N.Y. 1968), Judge Weinstein found that a file devoid of any indication for the board's decision, would deprive a registrant of due process:

> In permitting an appeal from the decisions of a local board, the regulations governing the selective service system provide that the registrant may specify claimed errors. 32 C.F.R. §1626.12. The opportunity to rebut allegedly incorrect conclusions . . . is essential to a meaningful appeal. See United States v. Purvis, 403 F.2d 555 [at 562] (2nd Cir. 1968). *Where no facts or inferences upon which the local board's conclusion is based are stated effective rebuttal is impossible.*[9] No advocate can persuasively assert grounds for reversal when the bases for the decision below are unknown. The right of appeal from an administrative decision, guaranteed by the regulations was in effect denied. [Emphasis added.] 293 F. Supp. at 345.

In *United States ex rel. Morton* v. *McBee*, 310 F. Supp. 328, 332 (N.D. Ill. 1970) the Court stated:

> The constitutional requirement of some specificity in a selective service record is clear. A registrant is at least entitled to be told in what way his case is defec-

[9] Cf. *Hunt* v. *Local Board*, 438 F.2d 1128, 1131 (3rd Cir. 1971) (*en banc*): "Plaintiff complains that the Local Board . . . denied [him] the procedural opportunity to [even] carry the burden of establishing his entitlement to a deferment." (Gibbons, J., concurring).

> tive so that he has a reasonable opportunity to obtain evidence to support it. The local board should endeavor to point out exactly what items influenced its opinion thereby providing the registrant-appellant a fair opportunity to attack those conclusions. It is argued by the government, as it has been in other selective service cases, that Congress did not require the local boards to be judicial tribunals and make specific findings. The point is made that local boards are lay organizations, consisting of untrained and unpaid members who are not equipped to make complete factual determinations of the evidence. But the mere fact that a decision making body is unpaid and untrained does not empower it to make blind judgments. It is inconsistent not only with the historic development of our legal system, but with constitutional principles of due process and fairness. It is true that Congress did not specifically require factual findings to be made by the local board but board decisions are reviewable, and absent some indication of the underlying basis for the local board's conclusion, intelligent review is impossible. This does not necessarily mean detailed findings of fact and conclusions of law such as a court would enter, but some specific suggestion of the local board's determination of the reasons for the board's action other than a general conclusion that the registrant failed to meet the requirements for a I-O classification.

Accord, *United States* v. *Washington,* 392 F.2d 37, 39 (6th Cir. 1968) ("... the board should supply the statements it disbelieves. This will allow the registrant to prepare an effective appeal."); and in *DeRemer* v. *United States,* 340 F.2d 712, 718 (8th Cir. 1965) the Eighth Circuit indicated

that a board should act fairly, ". . . endeavoring in good faith to point out exactly what items influenced its opinion and thus to give appellant a fair chance to attack these conclusions."

In *Scott* v. *Commanding Officer, supra,* and *Crownfield, supra,* the Third Circuit, relying on *United States* v. *Broyles, supra,* joined virtually every other circuit in holding that boards must state their basis for a negative decision and why that negative decision was reached in order to permit effective judicial review.

In *Scott,* the Court relied upon the following language in *Broyles, supra,* which is indicative of the stringent requirements in each of the circuits mentioned at pp. 15-16, *supra*:

> In any case where the board fails to disclose the basis for its decision we risk blind endorsement of a mistake of law. Where it is clear that a prima facie case was established, we conclude that in conscientious objector cases, it is essential to the validity of an order to report that the board state its basis of decision *and the reasons therefor,* i.e., whether it has found the registrant incredible, or insincere, or of bad faith, *and why.* 431 F.2d at 1137.

The Second Circuit, in *Lenhard, supra,* has adopted the test that a Court, upon reviewing a decision of the Selective Service System, must be provided with,

> . . . a record from which a Court can determine [1] whether there was a basis in fact for decision, [2] what that basis was and [3] whether the board applied the correct legal standard. 437 F.2d at 937.

Judge Zampano, the trial judge in *United States* v. *Morico*, 415 F.2d 138 (2nd Cir. 1970), stated:

> I think it would be appropriate, let me say, and helpful to everyone concerned if in this limited area where we have very delicate rights in balance that the Court . . . not just be given the entire record and in effect [told] you go through it to see what we [the local or appeal board[10]] were thinking and justify our position if you can. 416 F.2d at 143.

The requirement of specificity set forth above is unassailable. The only question remaining is whether a violation of the requirement is a due process claim subject to pre-induction review.

B. Sec. 10(b)(3) and the Fifth Amendment Violation in Petitioner's Case.

Judge Lumbard, in dissent below, 430 F.2d 380-388, found that petitioner's pre-induction claim that the Selective Service appeal procedures violated due process,[11] was unaffected by §10(b)(3). He also concluded that his analysis was clearly consistent with this Court's decisions in *Oestereich* v. *Selective Service*, 393 U.S. 233 (1968), and *Breen* v.

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[10] In *Crownfield, supra*, the court noted that:

> Where a local board has in fact reopened and the registrant has proceeded to exhaust his administrative remedies, however, it is the decision of the *appeal board* which must be supported by a statement of reasons. 3 SSLR at 3834, n. 2.

Accord *St. Clair, supra* at 341.

[11] We assume that the court in dealing with this instant issue has rejected our argument that the procedure followed by the Selective Service System in this case involved "a clear departure by the Board from its statutory mandate," *Oestereich, supra*, at 238. See Point I, *supra*.

Selective Service, 396 U.S. 460 (1970), and was supported by decisions of other district and circuit courts.[12]

In dissent, Judge Lumbard succinctly analyzed the applicability of *Oestereich* and *Breen*:

> In Oestereich, Breen and this case, the registrant challenges a procedure unauthorized by statute, while claiming that the regulation deprives him of a right based on higher authority. * * * Here, the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an a fortiori case for preinduction review. In neither Oestereich, Breen, nor this case are there any discretionary determinations of the system involved nor are there any factual inquiries required. See Bucher v. Selective Service System, 421 F.2d 24, 27 (3 Cir. 1970) ("The Section bars pre-induction judicial review only where there is a challenge to the System's resolution of factual questions in the classification or processing of a draft registrant"). In all these cases, the System acted in reliance on a purportedly valid regulation, in such a way as to deny the registrant a firmly established right. Since I would find that the

[12] This case is clearly distinguishable from *Clark* v. *Gabriel*, 393 U.S. 256 (1968) and *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), aff'd per curiam 393 U.S. 316 (1969). The former, a pre-induction attack on the denial of Gabriel's conscientious objector claim by his local board, was a clear attempt to litigate the "basis in fact" issue in a pre-induction civil suit—exactly the kind of issue §10(b)(3) was enacted to bar. *Oestereich, supra* 393 U.S. at 241 (Harlan, *J.*, concurring). *Boyd* on the other hand, is more properly analyzed as a "standing" case rather than a holding based on §10(b)(3) for there, unlike this case and *Breen* and *Oestereich*, the plaintiffs had not received induction orders. *Fein, supra* at 383 (Lumbard, *C.J.*, dissenting). See, Donahue, *The Supreme Court v. Section 10(b)(3), supra* at 914-915, 940-941.

Oestereich exception reaches Fein's case, I would hold it not barred by Section 10(b)(3).

If the Oestereich exception is to be read narrowly, [citing Justice Harlan's concurrence in *Breen* at 396 U.S. 468], I would recognize a third exception into the section. This exception would permit preinduction review of claims, such as Fein's, that "the very statutes or regulations which the Board administer are facially invalid." Oestereich v. Selective Service System, 393 U.S. 240, 89 S. Ct. at 418, 21 L. Ed.2d 402 (Harlan, J., concurring). In Oestereich the Court showed itself willing creatively to construe Section 10(b)(3); I think that the facts of this case require another exercise of construction here.

I do not believe that Congress, even if it so intended, could by a provision such as Section 10(b)(3) deprive the federal courts of their power to hear allegations that a governmental agency has denied a citizen procedural due process before the registrant is in custody. See 393 U.S. at 243 n. 6, 89 S. Ct. 414. My reading of the section and of its legislative history convinces me that congress had no such intention : . . So, faced with a difficult inquiry into the section's constitutionality or a saving construction consistent with Congress' intent and the statute's clear wording I would recognize another exception to the section to permit claims that an authorizing statute or board regulation is invalid because it is contrary to the constitution. 430 F.2d 382-383.

In *Hunt* v. *Local Board,* 438 F.2d 1128, 1135 (3rd Cir. 1971) (*en banc*), Judge Gibbons, in concurrence, held that §10(b)(3) did not bar a pre-induction attack upon a violation of this Court's decision in *Mulloy* v. *United States,*

398 U.S. 410 (1970), because while "Administrative appellate review may be a sufficient due process substitute for pre-induction judicial review . . . discretionary elimination by the original administrative agency of any administrative review, coupled with postponement of judicial review until a criminal trial or . . . post-induction habeas corpus" may be unconstitutional. *Id.* It is to be recognized that Fein's claim of deprivation of the right to a meaningful appeal is virtually indistinguishable from Hunt's allegation of the failure to grant him any appeal at all. *Gonzales, supra* at 415. See also fn. 9, p. 19, *supra; Barker* v. *Hershey,* 309 F. Supp. 277 (D. Wisc. 1969).

Fein's case, save the difference in the particular classification involved, is similar to *Wiener* v. *Local Board,* 302 F. Supp. 266 (D. Del. 1969). There, Judge Steel held that where on an appeal by the state director of Selective Service from a local board's assignment of a II-A classification (occupational deferment) to a registrant, the failure of the clerk of the board to afford the plaintiff an interview with a government appeal agent coupled with the state director's refusal to state the reasons for his appeal deprived the registrant of due process as contemplated by this Court in *Gonzales.* See also the exhaustive opinions of Judge Pettine in *Murray* v. *Vaughn,* 300 F. Supp. 688 (D. R.I. 1969) and *Murray* v. *Blatchford,* 307 F. Supp. 1038 (D. R.I. 1969). See also *Edwards* v. *Local Board,* 313 F. Supp. 650 (E.D. Pa. 1970). In all of these cases it was recognized that the actions of the Selective Service System were inconsistent with the most basic notions of due process and further that they were not violations susceptible to "cure" save by judicial intervention. Seen in this light, the actions of these courts comport with Congress' overall

intention to insure the smooth functioning of the Act. Cf. *Oestereich, supra* (Harlan, J. concurring).

III.

Petitioner's claims are not barred by the ten thousand dollar requirement of 28 U.S.C. §1331.

A. Petitioner's Induction Would Deprive Him of $10,000 in Personal Income.

The Federal Courts have been inconsistent in their treatment of the standard of valuation to be used in cases seeking vindication of constitutional rights. Some courts have adopted a strict interpretation of the statute's language[13] as did Judge Hays below. 430 F.2d at 380. The analysis of other courts have been more liberal.[14] The Second Circuit and the district courts within its jurisdiction have been, at the least, inconsistent in their treatment of the issue in cases involving constitutional rights. Compare *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), and Judge Hays' concurring opinion here, with the cases cited in fn. 14, *infra*. One thing, however, remains clear within this morass.[15] As Judge Weinstein observed in *Cortright* v. *Resor*, 3 SSLR 3804:

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[13] E.g., *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir. 1970), cert. denied 39 U.S.L.W. 3526 (Dec. 24, 1970); *Yoder* v. *Tribes of Fort Peck Indian Reservation*, 339 F.2d 360 (9th Cir. 1964); *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964).

[14] See *Berk* v. *Laird*, 429 F.2d 302, 306 (2nd Cir. 1970); *Phillips* v. *Rockefeller*, 435 F.2d 976, 978, n. 5 (2nd Cir. 1970); *Murray* v. *Vaughn*, 300 F. Supp. 688, 694-96 (D. R.I. 1969); *Cortright* v. *Resor*, 3 SSLR 3799, 3804 (E.D.N.Y. 1971) (Weinstein, *D.J.*); *Walsh* v. *Local Board*, 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969); *Fifth Avenue Peace Parade Committee* v. *Hoover*, —— F. Supp. ——, 70 Civ. 2646 (S.D.N.Y. April 28, 1971).

[15] Resolution of the issue has not been aided by the reluctance of both this and some Circuit Courts to pass on the issue. See e.g.,

> Dismissal for lack of jurisdiction is inappropriate unless it appears to be a legal certainty that less than $10,000 is at issue [citations omitted].

Since it can be arguably maintained that the differential between Fein's civilian and military income would exceed $10,000, Judge Hays' additional ground for dismissal is improper.

B. If Fein Did Not Establish an Arguable Controversy in Excess of $10,000, the Monetary Requirement Is Either Inapplicable or Unnecessary to Cases Such as This, or It Is Facially Unconstitutional.

The jurisdictional amount requirement of Sec. 1331 is inapplicable to suits brought upon claims that federal laws and federal officials have violated personal liberties guaranteed under the Constitution. Any other result would be inconsistent with Congress' purpose in adopting the jurisdictional amount requirement. It was repeatedly asserted in Congress when the juridictional amount was raised to $10,000 in 1958, that "the only significant categories of 'Federal question' cases subject to the jurisdictional amount are suits under the Jones Act and suits contesting the constitutionality of State statutes." 1958 *U. S. Code Cong. and Admin. News* 3103. See also S. REP. No. 1830, 85th Cong., 2d Sess. (1958); 1958 *U. S. Code Cong. and Admin. News* 3099, 3112-13, 3122. Any other result leads to the dangerous and irrational conclusion that, although invasions of constitutionally protected rights by state officials are subject to plenary judicial power (see 28 U.S.C. §1343), federal

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Oestereich v. *Selective Service*, 393 U.S. 233, 239 (1968); *Boyd* v. *Clark*, 393 U.S. 316 (1969); *Tatum* v. *Laird*, —— F.2d ——, No. 24,203 (D.C. Cir. April 27, 1971).

officers in cases like the one at bar, would be immune from judicial sanction in equitable cases for precisely the same illegal conduct. Any other result would render Section 1331 constitutionally suspect. See *Cortright* v. *Resor, supra; Fifth Avenue Peace Parade Committee, supra; Wolff* v. *Selective Service Bd.*, 372 F.2d 817, 826 (2d Cir. 1967) (Senior Judge Medina); *Giancana* v. *Johnson*, 335 F.2d 366, 371 (7th Cir. 1964) (dissenting opinion of Judge Swygert), *cert. denied*, 379 U.S. 1001 (1965); *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968) (dissenting opinion of Judge Edelstein), *aff'd on other grounds*, 393 U.S. 316 (1969); *Murray* v. *Vaughn*, 300 F. Supp. 388 (D. R.I. 1969) (Judge Pettine); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1306-08 (1970); but see, *Goldsmith* v. *Sutherland*, 426 F.2d 1395, cert. denied, 39 U.S.L.W. 3256 (Dec. 14, 1970).

As previously stated, this Court has not passed directly upon this question. E.g., *Oestereich* v. *Selective Service Bd., supra.* However, this Court and other federal courts have frequently dealt on the merits with cases conceptually similar to the present one without inquiring whether the jurisdictional amount required by Sec. 1331 was satisfied. See, e.g., *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964) (right to a passport); *Schneider* v. *Rusk*, 377 U.S. 163 (1964) (right to citizenship at issue); *Quaker Action Group* v. *Hickel*, 421 F.2d 1111 (D.C. Cir. 1970) (suit for declaratory judgment against the Department of Interior's regulations restricting picketing in front of the White House); *Thompson* v. *Clifford*, 408 F.2d 154 (D.C. Cir. 1968) (right to burial in Arlington National Cemetery). On some occasions, judges recognize but gloss over the question as, for example, in *Breen* v. *Selective Service*

Bd., 406 F.2d 636, 637 n. 1 (2d Cir, 1969), rev'd on other grounds, 396 U.S. 460 (1970), where the Second Circuit, referring to the jurisdictional amount said "[T]he Government has made no point about this nor shall we."

This Court would also have plenary jurisdiction, over the respondents without regard to the amount in controversy, under 28 U.S.C. §1361, if the argument set forth in Point I of our brief is adopted by the Court. See *Hunt* v. *Local Board,* 438 F.2d 1128, 1138 (3rd Cir. 1971) (*en banc*) (Hastie, J. concurring). This statute gives the District Courts "original jurisdiction of any action in the nature of mandamus to compel an officer employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Section 1361 was enacted by Congress in 1962 "to make it possible to bring actions against government officials and agencies in the U. S. District Courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U. S. District Court for the District of Columbia." S. REP. No. 1992, 87th Cong., 2d Sess. (1962); 1962 *U. S. Code Cong. and Admin. News,* 2784, 2785, 2788. See also, 3 DAVIS, ADMINISTRATIVE LAW §23.09, at 85 (1965 Supp.); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus,* 75 HARV. L. REV. 1479 (1962); Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review,* 53 GEO. L.J. (1964); Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 HARV. L. REV. 308 (1967).

The instant suit seeks mandatory injunctive relief against unconstitutional or *ultra vires* actions of the re-

spondents. As Byse and Fiocca have observed, even "[b]efore enactment of section 1361, some federal courts had issued mandatory injunctions which granted the same relief as writs of mandamus . . ." 81 HARV. L. REV. at 319, 312-313. Further, Section 1361 "should be interpreted as authorizing mandatory injunctive relief in original actions even though the relief awarded is essentially the same as, or identical to, that which would be granted by a writ of mandamus, thus developing the equity, rather than mandamus tradition." 81 HARV. L. REV. at 320, 355. This suit does not invite the Court to review an exercise of discretion by the defendant members of the Selective Service System. See Points I and II, *supra*. (Petitioner claims that the Respondents acted unconstitutionally or *ultra vires* their authority.) In fact, this suit prays the enforcement of a ministerial duty. See Point I, *supra*. It is, therefore, in the nature of an action for mandamus under 28 U.S.C. §1361, *Hunt, supra* at 438 F.2d 1138-40 (J. Hastie concurring); *Cortright* v. *Resor, supra* at 3 SSLR at 3806; *Rose* v. *McNamara*, 225 F. Supp. 891, 894 (E.D. Pa. 1963), aff'd per curiam, 339 F.2d 259 (4th Cir. 1964); see generally, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958); *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218-19 (1930); *Higinson* v. *Schoeneman*, 190 F.2d 32, 34-35 (D.C. Cir. 1951); 3 DAVIS, ADMINISTRATIVE LAW §§23.09-23.12 (1958, Supp. 1965).

Section 1361 is one of that group of statutes recently characterized by Professor Wright as granting "jurisdiction, without regard to the amount in controversy, in virtually all the areas that otherwise would fall under the general federal question statute." WRIGHT, FEDERAL COURTS §32, at 108 (2 ed. 1970). See also, 1 MOORE FEDERAL PRAC-

TICE ¶.90[1] (2 ed. 1964). (As Byse and Fiocca observed, "from the very beginning section 1361 was intended to be jurisdictional . . ." 81 HARV. L. REV. at 351.) Thus, assuming *arguendo* that the amount any of the named plaintiffs has in controversy is less than $10,000, the federal courts still have jurisdiction over the respondent members of the Selective Service System. The courts' jurisdiction over the defendants other than the United States is plenary under section 1361. "[I]t can provide the independent basis of jurisdiction necessary to sustain an action for a declaratory judgment." Byse and Fiocca, 81 Harv. L. Rev. at 351. Moreover, it provides the independent basis of jurisdiction necessary to issue the complete injunctive relief requested by petitioner, for the mandamus and mandatory injunctive remedies tended to merge even before enactment of Section 1361 and surely have merged since. See generally, Byse and Fiocca, *supra*, 81 Harv. L. Rev. 308 *passim*. Since the relief requested and properly available under Section 1361, includes an order in the nature of mandamus, jurisdiction is valid notwithstanding §1331.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

Respectfully submitted,

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No. 70-58

In the Supreme Court of the United States

OCTOBER TERM, 1971

OLIVER T. FEIN, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-58

OLIVER T. FEIN, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court (A. 90-96) is unreported. The opinions of the court of appeals (A. 97-120) are reported at 430 F. 2d 376.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1970. On October 16, 1970, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari to and including December 19, 1970. The petition was filed on that date; it was granted on March 8, 1971 (401 U.S. 953). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 10(b)(3) of the Military Selective Service Act of 1967 bars preinduction judicial review of petitioner's challenge under the Due Process Clause of the Fifth Amendment to Selective Service appeal procedures.

2. Whether, at all events, petitioner should be required to demonstrate that the monetary amount in controversy satisfies the $10,000 jurisdictional requirement of 28 U.S.C. 1331.

STATUTES INVOLVED

Section 1331(a) of Title 28, United States Code, provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3), provides in relevant part as follows:

> The President is authorized—
>
> * * * * * *
>
> to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction and maintenance of records of persons registered under this title [sections 451, 453, 454, 455,

456, and 458–471 of this Appendix], together with such other duties as may be assigned under this title [said sections]: * * * Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title [said sections], of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * * The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], and the determination of the President shall be final. No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be op-

posed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President, only when there is no basis in fact for the classification assigned to such registrant. * * *

STATEMENT

Petitioner, a doctor of medicine, commenced this civil suit in the United States District Court for the Southern District of New York on February 7, 1969, seeking to enjoin his induction into the armed forces essentially on the ground that the Selective Service appeal procedures, which resulted in his I–A classification, violated due process of law. The district court (A. 90–96) dismissed the suit for lack of jurisdiction under Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. 460 (b)(3). A divided court of appeals affirmed (A. 97–120).

Petitioner registered with his local board in Yonkers, New York at the age of eighteen and, on March 10, 1959, was assigned a student (II–S) deferment as an undergraduate at Swarthmore College, Swarthmore, Pennsylvania (C.A. App. 101a).[1] Except for a brief period not here relevant, he retained that classification until July 19, 1967, when, following his graduation from Western Reserve University School of Medicine, he received an occupational (II–A) deferment for his internship (C.A. App. 102a).

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[1] "C.A. App" references are to the printed appendix in the court of appeals, a copy of which is on file with the Clerk of this Court; "A" references are to the Appendix filed by the parties in this Court.

On September 12, 1967, while still classified II–A, petitioner wrote his local board (A. 27) claiming that he was "a conscientious objector to war and the institution which propagates war, the military." He requested and was mailed SSS Form 150 (Special Form for Conscientious Objectors), which he completed and returned to his local board on September 20, 1967. In an attached statement (A. 37–46), he explained that his beliefs derived from three ideals: that "human beings are primarily 'good' ", that "the expression of this 'goodness' can only be realized if human beings are allowed to fulfill their potential," and that "all human beings are fundamentally equal, in terms of their value as human beings" (A. 37). "War," he said, "violates this essential being in all men * * * it fosters irresponsibility for inhuman and cruel acts. [It] demands a style of life, which is violent and hierarchical. It curbs and extinguishes rather than expands man's potential" (*ibid.*). These beliefs, he added, "are not merely a personal moral code, but are ideals which emanate from centuries of religious tradition" (A. 38).

In response to the question when, if ever, he would use force, petitioner stated that "I believe in the power and values of moral and ethical force, while I reject violent force," except when used in "self defense" or in defense "of a loved one" (A. 41). While he acknowledged that the early teachings of his parents and the Lutheran Church undoubtedly had some influence on the shaping of his convictions (A. 38, 39, 42), he also indicated (A. 42–43) that his conscientious objection to war did not begin to develop until

his college years. He was then directly exposed for the first time to the injustices of segregation in the South, to living conditions in the slums of San Francisco, and to the problems in a "Negro ghetto" in Cleveland, Ohio (A. 42–44). These experiences, he said, resolved him to "a full commitment to non-violence" (A. 44). This view allegedly crystallized into petitioner's present opposition to war after he had participated in a community project in Cleveland sponsored by Students for a Democratic Society, which, he claimed (A. 44), provided him with the opportunity to "fulfill my new non-violent commitment and provide a framework for working out my ideals about justice and equality."

After receiving the conscientious objector claim, and the supporting letters (A. 47–52), petitioner's local board invited petitioner to appear personally on November 15, 1967, to discuss his beliefs; written summaries of that appearance were prepared by petitioner (A. 53–54) and by the local board (A. 57–58), and were placed in petitioner's Selective Service file. Following the meeting, petitioner was denied a I–O classification "at this time" (*ibid.*) and was retained in the "lower" Class II–A.[2]

On February 14, 1968, petitioner was reclassified I–A (C.A. App. 102a); the next day he was mailed a Notice of Classification (Form 110) and a letter advising him of his right to take an administrative appeal or request a personal appearance before his

[2] Selective Service regulation 32 C.F.R. 1623.2 provides that each "registrant shall be classified in the lowest class for which he is determined to be eligible."

local board. Petitioner requested and was granted a personal appearance on May 27, 1968. Prior to that date, he submitted to his local board a lengthy statement responding to specific questions raised by board members during his earlier appearance (C.A. App. 66a–68a; see Appendix A, at pp. 63–66, *infra*). In addition, counsel wrote a letter on petitioner's behalf on May 21, 1968; in it the attorney set forth his legal opinion that petitioner's beliefs had sufficient religious content to qualify for conscientious objector status (C.A. App. 67a; see Appendix B, at pp. 67–71, *infra*). Both the statement and the letter were placed in petitioner's Selective Service file.

Following the May 27 interview, the local board reclassified petitioner I–O (A. 59–60). On June 4, 1968, the State Director of Selective Service requested an appeal to the State Appeal Board,[3] stating simply that, "It is our opinion that the registrant would not qualify for a I–O classification as a conscientious objector" (A. 63). The following day, notice of the appeal was mailed to petitioner (A. 65a). By letter of June 10, 1968 (A. 66), petitioner requested "a statement indicating the basis for the State Director's appeal" and "an opportunity to reply to such a statement." The State Director, however, offered no explanation for his action either to petitioner or to the State Appeal Board (A. 63).

[3] Selective Service regulation 32 C.F.R. 1626.1 provides: "Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State may appeal from any determination of a local board at any time."

On June 20, 1968, petitioner's Selective Service file was considered *de novo* by the State Appeal Board. The file contained all the information that had been before the local board (A. 65a); it did not, however, include letters received subsequent to the State Director's appeal (C.A. App. 74a, 76a–77a, 79a), written by three individuals who had earlier submitted references that were in the file (A. 48, 49–50, 51–52) and who wished to reaffirm their belief in petitioner's sincerity. Accompanying the file was a "brief", or synopsis, prepared by an assistant appeal board clerk, summarizing the information in the Selective Service file (A. 89h, 89i). The appeal board, without stating any reasons, voted unanimously (4–0) to deny petitioner's claim to conscientious objector status and reinstate him in Class I–A (A. 67).

Since a registrant is precluded by regulation, 32 C.F.R. 1627.3, from taking an administrative appeal of a unanimous classification by the State Appeal Board, petitioner wrote to the National Director of Selective Service on July 13, 1968 (A. 69) requesting that the National Director, pursuant to 32 C.F.R. 1627.1, take an appeal on his behalf to the National Appeal Board (A. 71–72). The letter set forth in some detail the nature of petitioner's conscientious objection and summarized the prior administrative proceedings; it also enumerated five alleged "injustices" that purportedly occurred during the processing of his claim (A. 71). On September 16, 1968, the National Director entered a notice of appeal (A. 78, 79); petitioner's outstanding order to report

for induction was cancelled (A. 81).[4] The National Appeal Board voted unanimously (3–0) to classify petitioner I–A on November 26, 1968 (A. 85–86). It gave no reasons for its action.

Petitioner then filed the present suit,[5] asking that the court declare invalid the appeal procedures followed here by the State Director and the State Appeal Board as violative of procedural due process under the Fifth Amendment. He sought an order enjoining his induction and restoring him to conscientious objector status (A. 3). As earlier indicated, the district court (A. 90–96), relying on the decisions by this Court in *Clark* v. *Gabriel*, 393 U.S. 256, and *Boyd* v. *Clark*, 393 U.S. 316, ruled that the suit was barred by Section 10(b)(3) of the Military Selective Service Act of 1967, and dismissed the complaint. In affirming, a divided court of appeals[6] held that pre-

[4] While this appeal was pending, petitioner made a second request of the State Director for "a statement of your reasons for raising my classification of I–O to the Southern District Appeal Board" (A. 82). He was advised that, in the "opinion of the State Director," he "did not qualify for a deferment in Class I–O as a conscientious objector," and that the decision to appeal "was based upon the information contained in [his] selective service file" (A. 84). This exchange was not before the National Appeal Board.

[5] Petitioner's earlier order of induction had been cancelled (*supra*, pp. 8–9); no new order to report has yet been issued.

[6] Judge Blumenfeld of the District of Connecticut, sitting by designation, wrote the majority opinion. Judge Hays concurred in that opinion, but also relied separately on petitioner's failure to establish the $10,000 jurisdictional amount under 28 U.S.C. 1331 (A. 104). Then Chief Judge Lumbard dissented, concluding that this case was controlled by the decisions of this Court in *Oestereich* v. *Selective Service Board*, 393 U.S. 233,

induction judicial review could not "be obtained simply by framing issues in terms of purely legal questions divorced from their factual context, a tour de force attempted by the appellant in this case" (A. 102; footnote omitted).

SUMMARY OF ARGUMENT

I

In 1967, Congress amended Section 10(b)(3) of the Selective Service Act to foreclose judicial review of "classification and processing" questions under the statute until the complaining registrant "has responded either affirmatively or negatively to an order to report for induction * * *" (50 U.S.C. App. (Supp. V) 460(b)(3)). This Court, in order to reconcile the sweeping language of that provision with certain of the exemption provisions of the same Act, construed Section 10(b)(3) to permit limited preinduction judicial review where unauthorized administrative action had deprived the registrant, for reasons wholly unrelated to the merits of his claim, of a statutory exemption to which he was clearly entitled as a matter of law.

Petitioner comes before this Court seeking a similar construction of the statute with respect to his procedural due process claims; but he is here before he has been ordered to report for induction. In these circumstances, the controversy is not justiciable and his claims are not yet ripe for adjudication.

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and *Breen* v. *Selective Service Board*, 396 U.S. 460. In his view, petitioner, though not yet given the opportunity to do so, could sustain his allegation that the amount in controversy exceeds $10,000, as required by 28 U.S.C. 1331 (A. 104–120).

At all events, preinduction judicial review under Section 10(b)(3) is inappropriate in this case. Petitioner has been assigned a I-A classification on the basis of an evaluation of the merits of his claim by the State Appeal Board and the National Appeal Board. The courts cannot determine whether he is entitled to conscientious objector status without an examination of his Selective Service file to ascertain if the administrative denial of his claim was without factual basis. Congress has restricted judicial review in such circumstances to proceedings after the registrant has responded to an order of induction to prevent litigious interruptions in the induction process. Where, as here, the registrant is not clearly entitled to a specific exemption from service that Congress provided, there is no occasion to create an implied exception to the congressional directive in Section 10(b)(3) that judicial review of classification is to be postponed until after induction or refusal to report for induction.

This is especially so in the present case, where the challenged procedures were not without statutory basis. Congress has mandated that the decisions of local boards "shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe" (50 U.S.C. App. 460(b)(3)). By regulation, the President has authorized State Directors of Selective Service to take an appeal "from any determination of a local board at any time" (32 C.F.R. 1626.1). Pursuant to that authority, the State Director in this case noticed an appeal from the local board's decision to classify

petitioner I–O. He submitted no statement of reasons for his action to the State Appeal Board or to petitioner. On a *de novo* review of the information in petitioner's Selective Service file, the State Appeal Board reached a contrary conclusion from the local board.

Such procedures were not improper; they were not unauthorized by statute. Even if it ultimately were determined that the action of the State Appeal Board cannot stand because petitioner had presented a *prima facie* claim and no reasons had been stated for denial of his claim, that decision necessarily would turn on a review of the administrative judgment in evaluating the evidence—*i.e.*, on an analysis of the information in petitioner's Selective Service file to ascertain whether he set forth a *prima facie* claim. Such judicial scrutiny of administrative fact-finding processes involves precisely the type of litigious interruption with preinduction proceedings that Congress intended to eliminate by the bar of Section 10(b)(3). This Court has not hesitated to apply that bar where, as here, it can do so without infringing on a registrant's uncontroverted right to exemption under another provision of the Act.

II

In suits brought by Selective Service registrants to enjoin their induction, the only available grounds for federal jurisdiction are the general grants of federal question and diversity jurisdiction, both of which require that "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs" (28 U.S.C. 1331, 1332).

Congress has thus conditioned access to the federal courts on a registrant's ability to establish that his dispute involves a minimum monetary amount. The federal courts may not ignore this limitation even though it may bar consideration of cases that otherwise bring into question significant federal rights. This is not one of those situations where Congress has made a specific determination to allow suits without any showing of jurisdictional amount, as it has in various Civil Rights Acts and other statutes. Accordingly, even if it be determined that this preinduction civil suit is justiciable and not barred by Section 10(b)(3), petitioner should be required to demonstrate that the monetary amount in controversy satisfies the $10,000 jurisdictional requirement of Section 1331.

ARGUMENT

I. INTRODUCTION

In order to bring the question before the Court into sharper focus, we preface our analysis of the issues with a brief statement of what is not at issue here.

This Court is not now called upon to determine whether petitioner's assigned classification is wholly without factual basis. Administrative action which "inescapably involves a determination of fact and an exercise of judgment" is undeniably outside the permissible scope of preinduction judicial review. *Clark* v. *Gabriel,* 393 U.S. 256, 258. Similarly, there is no question in this case *whether* petitioner can obtain

judicial review of the administrative appeal procedures followed by Selective Service in processing his claim to conscientious objector status. Congress has mandated in Section 10(b)(3) of the Military Selective Service Act (50 U.S.C. App. 460(b)(3)) that those procedures are subject to scrutiny by the courts, but only in habeas corpus proceedings after induction[7] or in a criminal prosecution for wilful refusal to submit to induction. And, as this Court recognized in *Clark* v. *Gabriel, supra,* 393 U.S. at 259, this limited statutory option suffers no constitutional infirmity because the registrant called upon to respond "either affirmatively or negatively to an order to report for induction" (50 U.S.C. App. 460(b)(3)) has claimed exemption as a conscientious objector.

Thus, the question here is simply one of timing: whether, in the particular circumstances of this case, petitioner's procedural due process challenge to the manner in which his conscientious objector claim was processed by Selective Service warrants an acceleration of the judicial review to which he plainly is entitled at a later date. For the reasons set forth below, we think not.

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[7] While Section 10(b)(3) does not specifically preserve the habeas corpus remedy, the clear intent of Congress (see H. Rep. No. 267, 90th Cong., 1st Sess. 30–31; S. Rep. No. 209, 90th Cong., 1st Sess. 10) was to adhere to the then prevailing judicial precedents which plainly permitted habeas corpus to test the validity of induction. See *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 235–236; *Witmer* v. *United States*, 348 U.S. 375, 377.

II. SECTION 10(b)(3) SHOULD NOT BE EXPANDED TO PERMIT PREINDUCTION JUDICIAL REVIEW OF THE PROCEDURAL DUE PROCESS CLAIMS RAISED IN THIS CASE

A. THE SCOPE OF PREINDUCTION JUDICIAL REVIEW

1. Prior to 1967, the conscription statutes in this country contained no explicit provision relating to judicial review of draft classifications by the Selective Service System.[8] Congress had simply provided that the decision of local and appeal boards were to be "final."[9] These finality provisions, however, have long been construed by this Court as indicating a legislative intent to restrict only the scope of judicial review, not to deprive the registrant of all access to the courts. Thus, two early cases, *Falbo* v. *United States*, 320 U.S. 549, and *Estep* v. *United States*, 327 U.S. 114, established that the courts could entertain a challenge to an administrative denial of a claimed exemption or deferment from military service after a registrant had exhausted his administrative remedies within the Se-

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[8] Selective Draft Act of 1917, ch. 15, § 4, 40 Stat. 80; Selective Training and Service Act of 1940, ch. 720, § 10(a)(2), 54 Stat. 893, amending the prior law, which had deemed a registrant to be under the jurisdiction of the military from the date of the induction order, to provide that a registrant was not subject to military jurisdiction until actual induction; 54 Stat. 895); Selective Service Act of 1948, ch. 625, § 10(b)(3), 62 Stat. 620; Universal Military Training and Service Act of 1951, ch. 144; § 10(b)(3), 65 Stat. 87, 50 U.S.C. App. 460(b)(3).

[9] Moreover, § 13(b) of the 1948 Act, 50 U.S.C. App. 463(b), explicitly excepted the Selective Service System from the provision relating to judicial review of action by other administrative agencies in the Administrative Procedure Act, 5 U.S.C. 1009, as amended, 5 U.S.C. (Supp. V) 701–706.

lective Service System.[10] But judicial relief was confined to cases in which there was "no basis in fact" for the assigned classification (327 U.S. at 122–123; and see *Witmer* v. *United States*, 348 U.S. 375), or in which the administrative action was in direct conflict with the statute (327 U.S. at 120), or the regulations (327 U.S. at 121). Moreover, most courts considered review to be barred completely by the finality provisions except in a criminal prosecution for refusal of induction (see, *e.g.*, *Estep* v. *United States*, *supra*; *Witmer* v. *United States*, *supra*) or on a petition for habeas corpus after submission to induction (see, *e.g.*, *Billings* v. *Truesdell*, 321 U.S. 542; *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 311–312).[11] See

[10] While this Court has since recognized that a relaxation of the exhaustion doctrine may be appropriate in criminal prosecutions under 50 U.S.C. App. 462, where the sole question is purely a legal one of statutory interpretation (*McKart* v. *United States*, 395 U.S. 185), it has recently reaffirmed the vitality of that requirement as a condition to judicial review in the absence of highly unusual circumstances that might legitimately excuse the failure to exhaust. See *McGee* v. *United States*, No. 362, October Term, 1970, decided May 17, 1971.

[11] Before 1967, only three cases permitted preinduction judicial review. In *Tomlinson* v. *Hershey*, 95 F. Supp. 72 (E.D. Pa.), the court, without discussing reviewability, permitted injunctive and declaratory relief on the ground that the local board's failure to act on the plaintiff's request for deferment invalidated the order of induction. *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa.), involved a termination of a II–S deferment to a medical student because the medical school he attended was in a foreign country. The district court ruled that such action by the board was contrary to the regulations and without basis in fact; it rejected the government's jurisdictional argument under the finality provisions and enjoined enforcement of the induction order. A similar result was reached in

cases collected in Comment, *Anticipatory Attacks on Selective Service Classifications*, 117 U. Pa. L. Rev. 899, 900 n. 10 (1969).

In 1967, the Second Circuit broke with these earlier decisions in the highly publicized case, *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817, a civil action seeking preinduction judicial review. The case involved a delinquency reclassification of registrants who had been placed in Class I–A for participating in demonstrations at their local draft boards in protest against the conflict in Vietnam. Suit was commenced before the issuance of induction orders and while administrative appeals were still pending. Even so, the court, while acknowledging that relief prior to induction would ordinarily be unavailable, intervened because first amendment rights were thought to be involved. Relying on *Dombrowski* v. *Pfister*, 380 U.S. 479, the Second Circuit concluded that the action by the local boards was by nature punitive, that it had the effect of unlawfully [12] inhibiting activity arguably protected by the First Amendment, and that, therefore, it required immediate judicial intervention (372 F. 2d at 823–825).

2. Congress reacted promptly to the *Wolff* decision. In the Military Selective Service Act of 1967, 50

Townsend v. *Zimmerman*, 237 F. 2d 376 (C.A. 6), where the court, without considering the finality provisions, set aside an induction order which, because issued during the pendency of plaintiff's administrative appeal, violated 32 C.F.R. 1626.41.

[12] The court found that the local boards lacked authority to use their delinquency-reclassification power for punitive purposes, and in so doing they had exceeded their jurisdiction by reclassifying plaintiffs (372 F. 2d at 820–822).

U.S.C. App. (Supp. V) 451 *et seq.*, the finality provisions were amended to provide (50 U.S.C. App. (Supp. V) 460(b)(3)):

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title * * * after the registrant has responded either affirmatively or negatively to an order to report for induction * * *: *Provided,* that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President, only where there is no basis in fact for the classification assigned to such registrant.

The legislative history reflects that the House Armed Services Committee added this language[13] in order more clearly to reenunciate "the principle already in existing law" (H. Rep. No. 267, 90th Cong., 1st Sess. 7),[14] and that the provision was intended as a

[13] The 1967 amendments to the Selective Service Act as initially passed by the Senate made no change in the finality provision; however, the Senate committee emphasized that the original congressional intent was not to permit judicial review prior to induction (S. Rep. No. 209, 90th Cong., 1st Sess. 10):

> Until recently there was no problem in the observance of the finality provision. In several recent cases, however, district courts have been brought into selective service processing prematurely. The committee attaches much importance to the finality provisions and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction.

[14] It is generally recognized that the amendment does not alter the scope of review as earlier established by this Court in *Estep, supra,* and its progeny. See generally O'Neil, *Review of Selective Service Reclassifications*, 37 Geo. Wash. L. Rev. 536, 543 (1969).

direct response to those few judicial decisions that had permitted preinduction judicial review. The report of the House committee pointedly explained (H. Rep. No. 267, 90th Cong., 1st Sess. 30-31):

> The committee was disturbed by the apparent inclination of some courts to review the classification action of the local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle.

The committee's proposed language was approved by the House and accepted by the Senate in conference (H. Conf. Rep. No. 346, 90th Cong., 1st Sess.). Congress' stated objective was "to prevent litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. 15426; Sen. Russell).

Such interruptions inevitably occur in any case where preinduction judicial review is sought, particularly where—as usually happens—the suit is not filed until shortly before induction is scheduled. In such circumstances, the induction order usually is stayed and further processing of the registrant at the induction station is postponed pending the outcome of litigation. Nor is this disruptive effect eliminated where, as here, the registrant has exhausted his ad-

ministrative appeal remedies. See *Clark* v. *Gabriel*, *supra*, 393 U.S. at 258. Preinduction review still causes precisely the sort of "litigious interruptions" which Congress sought explicitly to preclude in Section 10(b)(3) so as not to "seriously affect the administration of the Selective Service System" (H. Rep. No. 267, 90th Cong., 1st Sess. 31).

3. A challenge to the constitutionality of amended Section 10(b)(3) was not long in coming to this Court. In two cases decided on the same day, the Court upheld its constitutionality (*Clark* v. *Gabriel*, *supra*), but construed it to permit preinduction judicial review in a carefully circumscribed category of cases (*Oestereich* v. *Selective Service Board*, 393 U.S. 233).

Oestereich involved a registrant who undeniably qualified for exemption from military service as a student "preparing for the ministry" within the meaning of 50 U.S.C. App. 456(g).[15] His IV-D classification had been revoked by the local board, not for any reason relating to the merits of his ministerial claim, but because he had returned his registration certificate to the government as an expression of dissent from the policies of this country relating to Vietnam. He was declared "delinquent," pursuant to Selective Service regulation 32 C.F.R. 1642.4(a), for failing to retain possession of his registration certificate (32 C.F.R. 1617.1), and was reclassified I-A. After un-

[15] The government did not dispute that Oestereich had fully satisfied the requirements of the exemption provision (393 U.S. at 235 n. 3, 238). By contrast, petitioner's conscientious objector claim in the instant case is disputed (see n. 44, *infra*).

successfully pursuing an administrative appeal, he sought preinduction judicial review of his delinquency reclassification.

This Court, in holding that the civil suit was not barred by Section 10(b)(3), determined that there were three factors that justified excepting that case from "the normal operations of the Act" (393 U.S. at 238): (1) The registrant fully qualified for a statutory exemption under 50 U.S.C. App. 456(g). (2) The board's revocation of that exemption by a delinquency classification was without congressional authorization. (3) The challenged local board action had concededly been based on behavior by the registrant completely extraneous to the board's evaluation of the claimed exemption. It was this set of "unusual circumstances" (*Gutknecht* v. *United States*, 396 U.S. 295, 303) which prompted the Court to declare that, "Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption" (393 U.S. at 237). Thus, precisely because it could then be ascertained with legal certainty that Oestereich qualified for exemption from military service, the Court concluded that to apply the Section 10(b)(3) bar to judicial review in this case "is to construe the Act with unnecessary harshness" (393 U.S. at 238).

The contrary result reached the same day in *Clark* v. *Gabriel, supra,* points up the narrow scope of the *Oestereich* decision. There, a registrant claiming exemption as a conscientious objector challenged in a

preinduction suit the local board's action in classifying him I–A. He contended that his classification "had no basis in fact, that the Board had misapplied the statutory definition of conscientious objector, and that the members of the Board were improperly motivated by hostility and bias against those who claim to be conscientious objectors" (393 U.S. at 257). Thus, the challenge in *Gabriel* was premised on contentions that the administrative action had violated fundamental notions of constitutional due process and had been grounded on considerations unrelated to the merits of the claimed exemption. This Court, however, found it unnecessary to reach these questions under the rule laid down in *Oestereich*, stating (393 U.S. at 258–259):

> Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. * * * To allow pre-induction judicial review of such determinations would be to permit precisely the kind of "litigious interruptions of procedure to provide necessary military manpower" * * * which Congress sought to prevent when it enacted § 10(b)(3).

Consequently, the case was remanded with instructions to dismiss it (393 U.S. at 259).[16]

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[16] Petitioner is thus correct that the due process contentions raised in *Gabriel* were not at that time properly before the Court. He asserts, however, that such contentions could not be considered by this Court in *Gabriel* because they were not raised in the lower courts. If that indeed is a basis for the *Gabriel* decision, petitioner should not now be permitted to raise here

Read together, *Oestereich* and *Gabriel* establish a construction of Section 10(b)(3) that precludes pre-induction review in the generality of situations where the local and appeal boards have applied their judgment and exercised their discretion, but permits such review where unauthorized administrative action has deprived the registrant, for reasons wholly unrelated to the merits of his claim, of a statutory exemption to which he is clearly entitled as a matter of law. A literal application of Section 10(b)(3) in the latter situation would conflict with the specific exemptions the Act provides.

In thus reconciling statutory provisions which, because of their sweeping terms, their overlap, or otherwise, are superficially inconsistent, the Court in *Oestereich* followed the settled practice of interpreting them so as to do the least violence to each, while at the same time best effectuating the overall design of the statute. *Williams* v. *Pritchard,* 4 Term Rep. 2; *Peck* v. *Jenness,* 7 How. 612, 623;[17] *New Lamp Chimney Co.* v. *Ansonia Brass and Copper Co.,* 91 U.S. 656, 663; *United States* v. *Moore,* 95 U.S. 760, 763.[18] See also *Spies* v. *United States,* 317 U.S.

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for the first time the contention that the State Director had no statutory authority to take an appeal from the local board's classification. See discussion *infra*, p. 38.

[17] In *Peck*, the Court stated: "One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

[18] In *Moore*, the Court stated: "In cases like this, the construction should be such that both provisions, if possible, may stand."

492; *Achilli* v. *United States*, 353 U.S. 373; *Sansone* v. *United States*, 380 U.S. 343. The congressional intent to prevent "litigious interruptions," it concluded, must be tempered when the local or appeal boards' action is "without statutory basis *and* in conflict with [the registrant's] rights explicitly established by statute *and* not dependent upon an act of judgment" (393 U.S. at 258; emphasis added).

Such was the case in *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460. There, the registrant lost a student (II–S) deferment—for which the government conceded he was fully qualified (396 U.S. at 463–464)—because his local board had assigned him a I–A delinquency classification (32 C.F.R. 1642.12) on the ground that he had surrendered his draft card at a public gathering in protest against the conflict in Vietnam. This Court, rejecting the argument that the case fell outside the narrow scope of preinduction review under Section 10(b)(3) because it involved revocation of a statutory deferment rather than a statutory exemption (396 U.S. at 466–467), found that *Oestereich* was indistinguishable (393 U.S. at 467–468):

> In both situations a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service. In both cases the order for induction involved a "clear departure by the Board from its statutory mandate," * * *, and in both cases § 10(b)(3) of the Act should not have been construed to require the registrants to submit to induction or risk criminal prosecution to test the legality of the induction order. * * *

See also *Kolden* v. *Selective Service Board No. 4*, 397 U.S. 47, where the Court vacated the judgments in several cases involving delinquency reclassifications and remanded them to their respective courts of appeals for further consideration in light of *Breen*.[19]

By contrast, preinduction judicial review was held unavailable in *Boyd* v. *Clark*, 393 U.S. 316. There, four Selective Service registrants holding I–A classifications challenged the validity of Section 6(h)(1) of the Act (50 U.S.C. App. 456(h)(1)) on the ground that student deferments in general unconstitutionally discriminate against registrants economically unable to attend college, and bear no reasonable relationship to the purposes of the Act. As pointed out by the court below (A. 102–103):

> In *Boyd*, the plaintiffs challenged their classification on several legal grounds without in any way contesting the discretionary or fact-finding aspects of the local board's decision to classify them I–A. *See* opinion below, *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968). Indeed, among the constitutional claims asserted in *Boyd* were some which had a source in common with those asserted by the appellant here: the due process clause of the fifth amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

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[19] In each of these cases, the registrant had held a statutory deferment to which he was concededly entitled prior to his unlawful (*Gutknecht* v. *United States*, 396 U.S. 295) delinquency reclassification: *Kolden* v. *Selective Service Board No. 4*, 406 F. 2d 631 (C.A. 8) (graduate student); *Kraus* v. *Selective Service System Local 25*, 408 F. 2d 622 (C.A. 4) (hardship deferment); *Anderson* v. *Hershey*, 410 F. 2d 492 (C.A. 6) (undergraduate student); *Chaikin* v. *Selective Service Board*

Nevertheless, this Court, relying on *Clark* v. *Gabriel, supra,* held that Section 10(b)(3) barred preinduction review. Unlike *Oestereich* and *Breen,* the claimants in *Boyd* had not established uncontroverted entitlement to an exempt or deferred status mandated by statute; they had not demonstrated that the board's action was unauthorized; nor had they shown that their classification had been based upon conduct unrelated to the merits of a claim for exemption or deferment. In these circumstances, a construction of the Act which required them to respond to an arguably valid induction order as a condition to judicial review of their constitutional claims did not produce the "unnecessary harshness" that led to the decisions in *Oestereich* and *Breen.*[20]

4. This Court has thus permitted preinduction judicial review only in those few situations where such review has been necessary to reconcile Section 10(b)(3) of the Selective Service Act with the explicit mandate in the statute that persons concededly entitled

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No. 66, C.A. 2, No. MR-2711, decided March 12, 1969 (undergraduate student); *Faulkner* v. *Laird,* C.A. 2, No. 1657, decided May 1, 1969 (occupational deferment); *Osher* v. *Selective Service Board No. 6,* C.A. 2, No. 33543, decided May 1, 1969 (graduate student).

[20] The dissent below reads *Boyd* as resting solely on the fact "that petitioners there had not reached a position of finality within the system" (A. 109–111). Even if that be true, petitioner in the instant case is similarly situated, since his earlier order to report was cancelled and no new induction order has been issued. At all events, we think that the "position of finality" that existed in *Oestereich* and *Breen*—*i.e.*, that the board had "finally" determined that the registrants qualified for exemption or deferment *on the merits of their claim*—cannot be said to exist here any more than it did in *Boyd.* See discussion *infra* at pp. 34–37.

to a statutory exemption or deferment shall not be subject to military "training and service". Most courts of appeals that have been called upon since 1967 to construe Section 10(b)(3) have adopted a similar approach.

Registrants have generally been permitted prior to induction to attack delinquency reclassifications which deprived them of the exemption or deferment that they were initially assigned by their local boards. See, *e.g.*, *Shea* v. *Mitchell*, 421 F. 2d 1162 (C.A.D.C.); *United States* v. *Imus*, 398 F. 2d 816 (C.A. 10); *McMillen* v. *Mitchell*, 2 SSLR 3464 (C.A. 7); and see cases cited at n. 19 *supra*. Similarly, appellate courts have allowed preinduction review of board denials of statutory I–S deferments [21] to graduate students who had received induction orders during the academic year. See, *e.g.*, *Carey* v. *Local Board*, 297 F. Supp. 252 (D. Conn.), affirmed, 412 F. 2d 71 (C.A. 2); *Nestor* v. *Hershey*, 425 F. 2d 504 (C.A.D.C.); *Bowen* v. *Hershey*, 410 F. 2d 962 (C.A. 1) (on stay pending appeal), on merits *sub nom. Crane* v. *Hershey*, 410 F. 2d 966 (C.A. 1); *Foley* v. *Hershey*, 409 F. 2d 827 (C.A. 7).

In the I–S cases, as in *Oestereich* and *Breen*, it was uncontested that the complainants qualified for deferment under the statute—*i.e.*, they were students pursuing a full-time course of study at a recognized educational institution and had been called up before the end of the academic year. Moreover, a denial of deferment on the ground that it was available only to

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[21] Section 6(i)(2), 50 U.S.C. App. 456(i)(2) mandates that a student who has been ordered for induction "shall" be deferred—under a I–S classification (32 C.F.R. 1622.15(b))—until the end of the current academic year.

undergraduates was contrary to the statutory provisions and hence beyond the authority of the local board. See generally Griffiths and Heckman, *Eligibility for I–S of Registrants Holding Graduate II–S Since July 1, 1967*, 1 SSLR 4041 (1968). Finally, the challenged administrative action was not dependent upon an act of judgment by the board in determining facts and evaluating evidence. Cf. *McKart* v. *United States*, *supra*, 395 U.S. at 197–199. Accordingly, the claims were held to be covered by this Court's decisions in *Oestereich* and *Breen*."

On the other hand, Section 10(b)(3) generally has been held to bar preinduction suits challenging the *procedures* used by local boards in the classification process. For example, the contention that the local board improperly refused to reopen a registrant's classification has been held insufficient to permit judicial intervention prior to induction. See, *e.g.*, *Lane* v. *Local Board No. 17*, 3 SSLR 3759 (C.A. 1); *Ferrell* v. *Selective Service Board*, 434 F. 2d 686 (C.A. 2); *Morgan* v. *Melchar*, C.A. 3, No. 18,697, decided May 5, 1971;[22] *Blatt* v. *Local Board No. 116*, C.A. 4, No.

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[21] Compare *Gregory* v. *Tarr*, 436 F. 2d 513 (C.A. 6), certiorari denied, No. 1625, October Term, 1970, June 28, 1971, denying preinduction review of a denial to a graduate student of a fatherhood (III–A) deferment under 32 C.F.R. 1622.30(a). The Court there rejected the argument that the President was without statutory authority to promulgate a regulation depriving graduate students of fatherhood deferments. The plaintiffs in that case were not clearly entitled to a statutory deferment which had been denied them by action of the board that was unauthorized by statute. And see *Evans* v. *Local Board No. 73*, 425 F. 2d 323 (C.A. 10).

[22] We do not read the *en banc* decision by the Third Circuit in *Hunt* v. *Local Board*, 438 F. 2d 1128, as holding otherwise.

15,122, decided June 8, 1971; *Edwards* v. *Selective Service Board No. 111*, 432 F. 2d 287 (C.A. 5); *Czepil* v. *Hershey*, 425 F. 2d 251 (C.A. 7), certiorari denied *sub nom. Czepil* v. *Tarr*, 400 U.S. 849; *Bookout* v. *Thomas*, 430 F. 2d 1343 (C.A. 9); *Rheingans* v. *Mitchell*, 438 F. 2d 345 (C.A. 9); *Sloan* v. *Local Board*, 414 F. 2d 125 (C.A. 10). The courts similarly have refused to entertain the preinduction claim that the registrant was ordered for induction out of turn under the random selection lottery system. See, *e.g.*, *Green* v. *Selective Service Board No. 87*, 419 F. 2d 813 (C.A. 8), certiorari dismissed, 397 U.S. 1059; *Stella* v. *Selective Service Board No. 66*, 427 F. 2d

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There, only one of the five judges that joined to uphold pre-induction review concluded that the board's refusal to reopen came within the *Oestereich-Breen* construction; essentially, he adopted the position expressed by Mr. Justice Harlan in his separate opinion in *Oestereich* (393 U.S. at 239–245). Since three of the remaining judges comprising the *Hunt* majority based their opinion on the district court decision in *Gregory* v. *Tarr*, 311 F. Supp. 1 (E.D. Mich.), which has since been reversed by the Sixth Circuit (see n. 22 *supra*), the *en banc* decision in *Hunt* seems to have little, if any, vitality. The subsequent panel decision in *Morgan*, *supra*, now pending on petition for rehearing *en banc*, seems to confirm this.

Petitioner also relies heavily on *Swift* v. *Director of Selective Service*, 3 S.S.L.R. 3839 (C.A.D.C.), where the court initially concluded that the refusal of the local board to consider a post-induction notice claim of conscientious objection was "blatant lawless[ness]" within the meaning of *Oestereich* (393 U.S. at 238). Since that decision, however, this Court has decided *Ehlert* v. *United States*, No. 120, October Term, 1970, decided April 21, 1971. The Court of Appeals for the District of Columbia Circuit subsequently reconsidered its decision in *Swift* in light of *Ehlert*; it vacated its earlier opinion and held the suit to be barred by Section 10(b)(3). See *Swift* v. *Director of Selective Service*, C.A.D.C., No. 24,137, decided July 16, 1971.

887 (C.A. 2).[24] Section 10(b)(3) has also been held to preclude review before induction of a challenge to the residential composition of the local board. See, *e.g.*, *Sellers* v. *McNamara*, 398 F. 2d 893 (C.A. 5), certiorari denied, 395 U.S. 950; *Czepil* v. *Hershey*, *supra*.

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[24] The contrary result reached by the Eighth Circuit in *Liese* v. *Local Board No. 102*, 440 F. 2d 645, is, we think, premised on an erroneous reading of *Oestereich* and *Breen*. In the view of that court, Section 10(b)(3) can be construed to permit preinduction judicial review of "the merits in some detail" in cases "where solely legal questions which are not clearly unmeritorious are presented." Cf. *Oestereich*, *supra*, 393 U.S. at 239–245 (Mr. Justice Harlan, concurring). This approach, we submit, overlooks the essential purpose behind the construction of Section 10(b)(3) enunciated in *Oestereich* and *Breen*—*i.e.*, to accommodate the clear statutory mandate embodied in the exemption and deferment provisions of the Act, which might otherwise be in conflict with the congressional mandate in Section 10(b)(3). Moreover, it calls for precisely the type of factual analysis that causes the "litigious interruptions" Congress sought to prevent. See *Clark* v. *Gabriel*, *supra*. Indeed, as later decisions in the Eighth Circuit indicate, unless there is clear entitlement to a statutorily mandated exemption or deferment, the *Liese* approach opens wide the door to preinduction judicial review in virtually every instance where it is claimed that the draft board acted beyond its authority or jurisdiction. See, *e.g.*, *Zerillo* v. *Local Board No. 102*, 440 F. 2d 136 (C.A. 8); *McLain* v. *Selective Service Local Board No. 47*, C.A. 8, No. 20,217, decided March 30, 1971; *Drake* v. *Selective Service Local Board No. 50*, C.A. 8, No. 20,477, decided May 10, 1971; *Wright* v. *Selective Service Local Board No. 105*, C.A. 8, No. 71-1011, decided June 10, 1971; *Ryan* v. *Hershey*, C.A. 8, No. 20,092, decided June 18, 1971. Such a construction, we submit, deprives Section 10(b)(3) of any meaning; for, it has long been settled that the only grounds for reviewing draft board actions in any type of judicial proceeding—whether pre-induction or post-induction—is that the board acted without authority or beyond its jurisdiction (see *Estep* v. *United States*, *supra*, 327 U.S. at 119–123).

In each of the above situations, the procedural attack was made in the context of a genuine dispute over the particular complainant's draft status and thus application of the Section 10(b)(3) bar to judicial review conflicted with neither a statutorily mandated exemption, as in *Oestereich*, nor a statutorily mandated deferment, as in *Breen*.[25] See *Morgan* v. *Melchar, supra,* slip op. 12. Nor, as this Court indicated in *Boyd, supra,* did the fact that the question was framed in terms of a constitutional challenge—as petitioner has done in the present case—eliminate the obstacle that there existed no uncontroverted

[25] Nor were the procedures challenged in the above court of appeals' cases themselves contrary to an explicit statutory mandate; they were, instead, under attack as an abuse of the board's discretionary powers under the regulations. Even if this had not been the situation, however, and it could be shown that the questioned procedure conflicted with a statutorily mandated *procedure*, that alone would not warrant preinduction review under the *Oestereich-Breen* construction of Section 10 (b)(3). For, as already indicated, the *Oestereich-Breen* construction was required to reconcile the sweeping language of Section 10(b)(3), proscribing all judicial review prior to induction, with exemption provisions that mandated no induction for those who clearly qualified. But, no such clash would exist when dealing with a statutorily mandated *procedure*; it alone does not by its terms exempt or defer a person from military service. Thus judicial review of the questioned procedure could appropriately take place after induction under Section 10 (b)(3) without clashing with any other congressional mandate. It is only when the procedure—whether embodied in statute or regulation—is exercised in such a way that it deprives a registrant of an exemption or deferment to which he is undeniably entitled under the statute that Section 10(b)(3) need be construed to permit preinduction review. That was precisely the situation with respect to the delinquency reclassification procedures involved in *Oestereich* and *Breen*. See, *e.g.*, *Lane* v. *Local Board No. 17, supra,* 3 SSLR at 3760.

right under the statute to be immune from military service. See, *e.g.*, *Steiner* v. *Officer in Command*, 436 F. 2d 687, certiorari denied, June 1, 1971, No. 1582, 1970 Term (C.A. 5); *Edwards* v. *Selective Service Board No. 111, supra; Czepil* v. *Hershey, supra; Coleman v. Local Board No. 61*, 432 F. 2d 225 (C.A. 10).

B. SECTION 10(b)(3) BARS PREINDUCTION REVIEW OF PETITIONER'S CLAIMS

Under the foregoing decisions and analysis, we submit that Section 10(b)(3) bars preinduction judicial review of the procedural due process claims raised here.

1. Before reaching that question, however, we think that the Court can properly decide the instant case without considering the Section 10(b)(3) issue. Here, no order of induction has been issued to petitioner since he received his I-A classification from the National Appeal Board (*supra*, n. 5),[26] and thus the case is not ripe for adjudication. See *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D. N.Y.), affirmed on other grounds, 393 U.S. 316.[27]

Courts have generally refrained from reviewing attacks—whether constitutional or otherwise—upon

[26] The order of induction referred to by the dissent below (A. 111), as a basis for distinguishing this case from *Boyd*, had been cancelled at the time a notice of appeal was filed with the National Appeal Board; such cancellation was expressly required by 32 C.F.R. 1627.8. No new induction order has been issued.

[27] As pointed out earlier (*supra*, pp. 25–26), this Court affirmed *per curiam* on the authority of *Clark* v. *Gabriel*, without reaching the "ripeness" issue that was decided by the three-judge district court.

statutes or regulations that have not yet been applied against the plaintiffs, since, as a general rule, there then exists no justiciable case or controversy within the meaning of article III of the Constitution. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–91. A limited exception to this policy of abstention, however, has been recognized where the challenged activity is thought to have a "chilling effect" (*Dombrowski* v. *Pfister, supra*) on basic rights of expression under the First Amendment (see *Wolff* v. *Selective Service Local Board No. 16, supra; National Student Association* v. *Hershey*, 412 F. 2d 1103 (C.A. D.C.)). But, in the absence of such exceptional circumstances, as is the case here, both *Wolff* and *National Student Association* indicate that a preinduction Selective Service action filed prior to receipt of an induction order will not be ripe for adjudication. And see *Boyd* v. *Clark, supra*, 287 F. Supp. at 563–564; *Feldman* v. *Local Board No. 22*, 239 F. Supp. 102, 105–106 (S.D. N.Y.); *Westerbeke* v. *Local Draft Board No. 2*, 118 F. Supp. 441, 444 (E.D. N.Y.).

The reasons are manifold. A registrant who has not yet been issued an induction order is not entitled to injunctive relief because he cannot show "irreparable harm." See *Watkins* v. *Rupert*, 224 F. 2d 47, 48 (C.A. 2); *Muhammad Ali* v. *Breathitt*, 268 F. Supp. 63, 65 (W.D. Ky.). Similarly, in such circumstances he is not "aggrieved." *Daniels* v. *United States*, 372 F. 2d 407, 414 (C.A. 9). Moreover, it has been held that he lacks standing because there exists no immediate danger of direct injury. See *Katz* v. *United States*, 287 F. Supp. 29 (S.D. N.Y.). Finally, there is the fact that the dis-

pute may become "moot" or "academic." See *Wolff* v. *Selective Service Local Board No. 16, supra,* 372 F. 2d at 823; *Feldman* v. *Local Board No. 42, supra,* 239 F. Supp. at 105. As the district court pointed out in *Boyd* (287 F. Supp. at 564), the plaintiff "may never be required to report for induction."

These considerations are particularly pertinent to the present suit. Petitioner is seeking injunctive relief with respect to an induction order which has not yet issued, and indeed, may never issue. His claims are thus premature and present no justiciable controversy that is ripe for adjudication.

2. At all events, we submit, Section 10(b)(3) of the Selective Service Act precludes preinduction review of petitioner's procedural claim. The administrative action under attack here was neither "without statutory basis" *nor* "in conflict with petitioner's rights explicitly established by the statute" *nor* independent of "an act of judgment" by the board. *Clark* v. *Gabriel, supra,* 393 U.S. at 258.

Petitioner is challenging a reclassification procedure which, like the reclassification procedure questioned in *Oestereich* and *Breen,* deprived him of a local board classification that would have permitted him to avoid certain military obligations. There the similarity ends, however. Both the ministerial (IV–D) exemption in *Oestereich* and the student (II–S) deferment in *Breen,* were revoked under the delinquency regulations because of "conduct or activities unrelated to the merits of granting or continuing that exemption" (393 U.S. at 237) or deferment. Such action, in each instance, required "no exercise of discretion by a

Board in evaluating evidence and in determining whether a claimed exemption [or deferment] is deserved" (393 U.S. at 238). Here, by contrast, the State Appeal Board's denial of petitioner's conscientious objector (I–O) classification that his local board had given him, and the similar ruling by the National Appeal Board, were based directly on an evaluation of the information contained in petitioner's Selective Service file; it was inextricably intertwined with the merits of his claim.[28]

Thus, petitioner's position in the present litigation is fundamentally different from that of the registrants in *Oestereich* and *Breen* when they came into court. With respect to petitioner, Selective Service has made a final determination on the merits of his claim—whether it be right or wrong—that he did *not* qualify for an exemption or deferment under the statute. With respect to the other two registrants, however, it had reached exactly the opposite conclusion on the merits prior to their delinquency reclassification. Consequently, the *Oestereich-Breen* analysis is inapposite; here we are not "able to say that it was plain on the record and on the face of the Act that an exemption had been granted * * *." *Oestereich* v. *Selective Serv-*

[28] Since it was the action of the State Appeal Board, and the National Appeal Board, that denied petitioner a I–O classification, that action is the proper focus of discussion. The action of the State Director in filing a notice of appeal did not alter petitioner's classification (see discussion *infra*, p. 43). Even that action, however, was premised on the State Director's evaluation of the information in petitioner's file. As stated in a letter to petitioner (A. 84), the decision to appeal "was based upon the information contained in [his] selective service file."

ice Board, supra, 393 U.S. at 238 n. 7; and see *Blatt* v. *Local Board No. 116, supra,* slip op. 7; *Steiner* v. *Officer in Command, supra,* 436 F. 2d at 689; *Evans* v. *Local Board, supra,* 425 F. 2d at 326. There is, "therefore * * * no clash between §10(b)(3) and another explicit provision of the Act." *Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 238 n. 7."

Indeed, petitioner concedes (Pet. Br. 32) that underlying his procedural due process claim there is a dispute concerning "the discretionary judgment of the Appeal Board as to whether it is or is not supported by a basis in fact in the record." Such was the case in *Clark* v. *Gabriel, supra,* and the Court's conclusion there pertains with equal force here (393 U.S. at 259):

> We find no constitutional objection to Congress' thus requiring that assertion of conscien-

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" Even if petitioner's entitlement to conscientious objector status were uncontested—which it is not (see n. 44, *infra*)—there would not necessarily be a clash with the congressional mandate of Section 10(b)(3). The exemption and deferment in *Oestereich* and *Breen* entitled the registrants to be free from "training and service" (see 50 U.S.C. App. 456(g) and (h)). Thus, to require them to undergo induction before obtaining judicial review—as Section 10(b)(3) prescribes—is directly contrary to their clear rights under other provisions of the statute. But "[t]he only unconditional right conferred by statute upon conscientious objectors is exemption from *combatant* training and service" (*Ehlert* v. *United States, supra,* slip op. 4). "Conscientious objector status does per se excuse the registrant from induction * * *." *United States* v. *Beaver,* 309 F. 2d 273, 276 (C. A. 4), certiorari denied, 371 U.S. 951. Section 6(j) provides expressly that even where a claim "is sustained", a conscientious objector may be "inducted into the armed forces under this title" and "assigned to noncombatant service." The mere fact that a registrant has a clear right to exemption under that statutory provision, therefore, need not always produce a conflict with the Section 10(b)(3) bar to preinduction judicial review.

> tious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction. * * *

The fact that petitioner has asserted a general constitutional challenge to the Selective Service appeal procedures does not justify pre-induction review. In applying the bar of Section 10(b)(3) in *Gabriel*, this Court refused to consider a similar constitutional contention that the classification procedures of the local board violated procedural due process (see pp. 21–22 *supra*). And, as indicated above (*supra* pp. 25–26), the subsequent decision in *Boyd* v. *Clark*, *supra*, was a clear holding that, in the absence of a conflict with a congressional mandate in another explicit provision of the Act, the Section 10(b)(3) proscription may not be lifted to entertain preinduction review of broad constitutional challenges. And see cases cited at p. 32 *supra*.

3. If our analysis above is correct, it disposes of this case without the need for further discussion. But even if the administrative action involved here were arguably not in accordance with the prescribed statutory or regulatory procedures, judicial determination of that issue is precisely what Congress intended to reserve for post-induction review (50 U.S.C. App. 460(b)(3); and see *Estep* v. *United States*, *supra*, 327 U.S at 119–123). See n. 24 *supra*. A brief examination of petitioner's claims will demonstrate the need for continued adher-

ence to that settled policy "to prevent litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. 15426).

a. Petitioner asserts for the first time in this Court that the review of his I–O classification by the State Appeal Board was impermissible because the State Director had no authority under the statute to appeal the local board's determination. Since that issue was not raised at any time in the courts below (see n. 16 *supra*), we question whether it is properly before this Court. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16; *California* v. *Taylor*, 353 U.S. 553, 557 n. 2; *De Sylva* v. *Ballentine*, 351 U.S. 570, 582; compare *Duigan* v. *United States*, 274 U.S. 195, 200; *Husty* v. *United States*, 282 U.S. 694, 701–702. In any event, it is without merit.

The Selective Service System was designed by Congress for the purpose of mobilizing the nation's manpower in an orderly and efficient manner, with the least possible recourse to the courts on questions of classification. See, *e.g.*, *Falbo* v. *United States*, *supra*, 320 U.S. at 554; *Estep* v. *United States*, *supra*, 327 U.S. at 137 (Mr. Justice Frankfurter, concurring); *Witmer* v. *United States*, *supra*, 348 U.S. at 380–381. To this end, Congress explicitly authorized the President "to create and establish" within the System such "civilian local boards, civilian appeal boards, and such other civilian agencies" as may be necessary (50 U.S.C. App. 460(b)(3)) to insure "the opportunity for full administrative review" (*Mulloy* v. *United States*, 398 U.S. 410, 416) of claims to exempt or deferred status. He was also authorized to

appoint a State Director in each state to be in immediate charge of the administrative processes within his jurisdiction.

On this statutory framework, the President has constructed an elaborate administrative review machinery, pursuant to his express authority "to prescribe the necessary rules and regulations to carry out the provisions" of the Act (50 U.S.C. App. 460(b)(1)). Cf. *United States* v. *Palmer*, 223 F. 2d 893, 896 (C.A. 3), certiorari denied, 350 U.S. 873. Classification decisions are in the first instance committed to the discretion and judgment of local boards (see 50 U.S.C. App. 460(b)(3); 32 C.F.R. 1623 and 1624). Congress provided that the action of the local board "shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe" (50 U.S.C. App. 460(b)(3)). By regulations, the President has authorized that administrative appeals may be taken to State Appeal Boards by the registrant or by certain persons on behalf of the registrant, including a government appeal agent (32 C.F.R. 1626.2), and by "[e]ither the Director of Selective Service *or the State Director of Selective Service as to local boards in his state* * * * *from any determination of a local board at any time*" (32 C.F.R. 1626.1; emphasis added).[30]

[30] Appeals from a classification by the State Appeal Board may be taken to the President (whose authority is exercised by the National Appeal Board) by the registrant himself if the decision appealed from was not unanimous (32 C.F.R. 1627.3), or, regardless of the vote by the State Appeal Board, by either a State Director or the National Director when he "deems it to be in the national interest or necessary to avoid an injustice" (32 C.F.R. 1627.1). See 50 U.S.C. App. 460(b)(3).

Petitioner maintains, however, that Congress did not intend these appeal procedures to apply in the limited situation where a local board determines that a registrant is entitled to conscientious objector status. He refers to the language in Section 6(j) of the Act (50 U.S.C. App. (Supp. V) 456(j)), which states: "Any person claiming exemption * * * because of such conscientious objections whose claim is sustained by the local board shall * * * be assigned to noncombatant service * * *."[11] Such language, however, was not intended to immunize from the appeal process favorable decisions by local boards under this exemption provision. Indeed, Congress so indicated in Section 10(b)(3) of the Act (50 U.S.C. App. 460(b)(3)):

> * * * local boards * * * shall, under rules and regulations prescribed by the President, have the power within [their] respective jurisdictions * * * to hear and determine, *subject to the right of appeal to the appeal boards herein authorized*, all questions or claims with respect to * * * exemption or deferment from,

[11] This language is unchanged from the pre-1967 law. The earlier provision contained additional language that was deleted in the 1967 Act, which entitled a registrant whose conscientious objector claim was "not sustained by the local board * * * to an appeal to the appropriate appeal board" and provided for an independent "inquiry and hearing" on such claim by the Department of Justice prior to a determination by the State Appeal Board (50 U.S.C. App. 456(j)). In removing these procedures, the House Armed Services Committee stated that "[r]egistrants claiming conscientious objection will therefore be awarded the same appeal procedures and administrative remedies that are available to all other registrants." 1967 U.S. Code Cong. & Admin. News, 90th Cong., 1st Sess., 1348.

> training and service under this title [including section 456(j)], of all individuals within the jurisdiction of such local boards. [Italics supplied.]

There is nothing in the statute to suggest, even inferentially, that this "right of appeal" extends only to the registrant, or persons acting on his behalf. Petitioner argues, however, that because of the Act's "silence and lack of specific authorization" (Pet. Br. 23), the Court should discern in the statutory scheme a legislative intent to withhold from State Directors the appeal authority that has been granted to them in 32 C.F.R. 1626.1. This Court, however, generally has refused to imply such limitations upon broadly delegated powers (cf. *Hannah* v. *Larche*, 363 U.S. 420), except where the exercise of those powers conflicts with an explicit congressional directive (see *Peters* v. *Hobby*, 349 U.S. 331; *Gutknecht* v. *United States*, 396 U.S. 295)—which is concededly (Pet. Br. 23) not the case here—or trenches on individual rights entitled to constitutional protection (see *Kent* v. *Dulles*, 357 U.S. 116; *Greene* v. *McElroy*, 360 U.S. 474; *Goldberg* v. *Kelley*, 397 U.S. 254).

The contention that the Executive delegation of appeal authority to State Directors falls into the latter category—on the ground that a I–O classification by the local board can be analogized to a verdict of acquittal in a criminal prosecution (Pet. Br. 24)—is unfounded. Local board proceedings are by nature non-adversary and non-judicial. Congress has recognized this in exempting Selective Service proceed-

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ings from the Administrative Procedure Act (50 U.S.C. App. 463(b)).

The sole function of local boards is to place each registrant within the community available for military service in a particular class (32 C.F.R. 1622.1), largely on the basis of information furnished (in answers to questionnaires and in written supporting statements) by the registrants. This task is performed not by "experts, real or purported, but [by] citizens of the neighborhood" in which the boards operate (*Ex parte Stanziele*, 138 F. 2d 312, 314 (C.A. 3), certiorari denied *sub nom. Stanziele* v. *Paullin, Commanding Officer*, 320 U.S. 797). Local boards do not adjudicate questions of individual responsibility; they do not hold trials to determine anyone's civil or criminal liability; they do not make findings of fact or issue rulings on questions of law. Nor do they indict, punish or impose any legal sanctions. Cf. *Uffelman* v. *United States*, 230 F. 2d 297, 303 (C.A. 9). Rather, their role is to carry out "the sifting and testing process by which individual eligibility, exemption and deferment are determined with [c]ongressional blueprints and enunciated legislative policy" (*United States* v. *Greene*, 220 F. 2d 792, 794 (C.A. 7)."[22]

[22] This is markedly dissimilar from the proceedings before the Loyalty Review Board in *Peters* v. *Hobby*, *supra*, or the Security Clearance Boards involved in *Greene* v. *McElroy*, *supra*. There the function was to review specific accusations against employees relating to their loyalty; the proceedings were adversary or quasi-judicial and the determinations made were "in the nature of adjudications affecting legal rights" (*Hannah* v. *Larche*, *supra*, 363 U.S. at 451). And see *Goldberg* v. *Kelley*, *supra*; cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123.

Thus, the analogy to a verdict of acquittal in a criminal prosecution is misplaced. Moreover, appeals by State Directors from grants of conscientious objector claims do not deprive registrants of any constitutional right. "The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from acts of Congress." *Hamilton* v. *Regents*, 293 U.S. 245, 264; and see *Welsh* v. *United States*, 398 U.S. 333, 356 (Mr. Justice Harlan, concurring). And, as expressed above (*supra* pp. 40–41), Congress has provided that the local board's determination that a registrant is entitled to that privilege is subject to appeal within the administrative system. Even if this appeal procedure ultimately results in a loss of conscientious objector status, that cannot be attributed to the State Director, especially where, as here, his sole action has been to file a notice of appeal (see pp. 46–47 *infra*). Rather, it rests with the State Appeal Board, whose duty it is to examine the registrant's file and classify him *de novo* on the basis of "[i]nformation contained in the record received from the local board" (32 C.F.R. 1626.24). See, *e.g.*, *McGee* v. *United States*, No. 362, Oct. Term, 1970, decided May 17, 1971; *McKart* v. *United States*, 395 U.S. 185, 198 n. 16; *United States* v. *Abbott*, 425 F. 2d 910, 913 (C.A. 8); and see pp. 48–49 *infra*.

Accordingly, the President did not exceed his statutory authority in promulgating the regulation (32 C.F.R. 1626.1) affording State Directors a right of appeal from classification decisions by the local board. Cf. *Edwards* v. *Selective Service Local Board No. 111*,

supra, 432 F. 2d at 295." Moreover, the exercise of that regulatory right by the State Director in this case—"based upon the information contained in [petitioner's] selective service file" (A. 84)—was entirely appropriate. Cf. *United States* v. *Cummins*, 425 F. 2d 646 (C.A. 6); *Weiner* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del.); *Nevarez Bengoechea* v. *Micheli*, 295 F. Supp. 257 (D. P.R.). There is thus no substance to petitioner's belated assertion (*supra* p. 38) that the *de novo* review of his conscientious objector claim by the State Appeal Board was "without statutory basis" within the meaning of *Oestereich* and *Breen*."

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[35] This regulation is not new. It was promulgated in 1951 (E.O. 10292, 16 F.R. 9862) under the 1948 Act, as amended, and has been consistently interpreted by the administrative agency and the courts (see p. 44 *infra*) as authorizing appeals by the State Director from local board classification decisions. Moreover, when Congress reenacted the statute in 1967, changing substantially the appeal procedures with respect to conscientious objector claims (see n. 31 *supra*), it left intact the regulatory authority of the State Director to take appeals to the State Appeal Board. Such a consistent and long-continued interpretation of a statute (*i.e.*, as authorizing the promulgation of the regulatory procedure here in question) by the office or agency charged with the Act's enforcement is entitled to great weight, particularly when Congress has reenacted the statute without repudiating the challenged construction or the alleged authority. See, *e.g.*, *Ehlert* v. *United States*, No. 120, Oct. Term 1970, decided April 21, 1971; *Commissioner* v. *Noel Estate*, 380 U.S. 678, 681–682; *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 241–242; *Billings* v. *Truesdell*, 321 U.S. 542, 552–553.

[36] Moreover, the argument is largely academic in the circumstances of this case, since here the National Director took an appeal to the President (whose authority is exercised by the National Appeal Board), who retained petitioner in Class I–A. Such action is explicitly authorized by statute: "The President,

b. Equally untenable is petitioner's contention that he was denied procedural due process because the State Director declined to provide him with a statement of reasons for taking an appeal and he thus could not prepare and submit to the State Appeal Board a meaningful written response in support of his claim.

The Selective Service regulations, 32 C.F.R. 1626.12,[35] prescribe that any person taking an appeal "may attach" to his notice of appeal a statement specifying the grounds on which he bases his request for further administrative review of the local board's classification. If the appeal is taken by the National Director or by a State Director, and he elects to ex-

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upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [including section 456(j)], and the determination of the President shall be final" (50 U.S.C. App. 460(b)(3)). Thus, the change in petitioner's classification from I-O to I-A by the National Appeal Board, which classifies *de novo* (see *Bowles* v *United States*, 319 U.S. 33; *Clay* v. *United States*, 397 F. 2d 901, 913 (C.A. 5), reversed on other grounds, No. 783, Oct. Term, 1970, June 27, 1971), was plainly authorized by statute and—in the absence of possible reliance by the State Appeal Board on a clearly erroneous legal standard (see p. 51 *infra*), which is concededly not the case here—suffers from no alleged infirmities that might have existed at an earlier level in the administrative review process.

[35] The regulation provides: "The person appealing may attach to his appeal a statement specifying the matters in which he believes the board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

ercise this privilege, it is generally recognized that procedural due process requires that he furnish a copy of his statement to the registrant and the registrant be given an opportunity to respond in writing. See, *e.g.*, *United States* v. *Cummins*, *supra*; *Weiner* v. *Local Board No. 4*, *supra*; *Nevarez Bengeochea* v. *Micheli*, *supra*; and cf. *United States* v. *Thompson*, 431 F. 2d 1265, 1271 (C.A. 3); *Murray* v. *Blatchford*, 307 F. Supp. 1038, 1054–1055 (D. R.I.); and cf. *Gonzales* v. *United States*, 348 U.S. 407; *Simmons* v. *United States*, 348 U.S. 397; *United States* v. *Nugent*, 346 U.S. 1; *United States* v. *Cabbage*, 430 F. 2d 1037, 1039–1041 (C.A. 6); *United States* v. *Owen*, 415 F. 2d 383, 388–389 (C.A. 8).

That principle is inapplicable to the present case, however, where the State Director, as was his prerogative (32 C.F.R. 1626.12), attached no statement of reasons to his appeal notice and furnished no additional information to the State Appeal Board. Petitioner's contrary assertion—*i.e.*, "the State Director's appeal was accompanied by either an oral or written statement to the Appeal Board specifying allegedly adverse evidence, or at least directing the Board's attention to what he considered to be the defects in the Local Board's determination" (Pet. Br. 10 n. 5)—has no support in the record [**] and rests on conjecture derived from "the practice of [other] State Directors * * * to submit such statements to the Appeal

[**] Petitioner's entire Selective Service file was made available to him for examination and xeroxing, at his request, after it had been returned to the local board following the decision of the National Appeal Board to retain him in Class I-A.

Boards" (*ibid.*). But, as indicated, the pertinent regulation is not mandatory; it states simply that the person taking an appeal "may attach" supplementary information." Whatever might be the practice of other State Directors, this case involves only the actions of this State Director with respect to petitioner.

In these circumstances, petitioner was not entitled to submit an additional written statement that had not been considered by the local board. As this Court pointed out in *Gonzales, supra*, 348 U.S. at 414–415, the right to file a statement of reasons with the State Appeal Board belongs to the person taking the appeal (see 32 C.F.R. 1626.12). While a registrant is entitled to review and respond to any new information added by others to his file subsequent to the local

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[37] This permissive language should be contrasted with the directive in 32 C.F.R. 1627.1(c) that the State Director taking an appeal to the National Appeal Board "shall place in such file a written statement of his reasons for taking such appeal." This requirement is due to the fact that the appeal by a State Director to the President, unlike his appeal to the State Appeal Board, is confined to situations which he "deems * * * to be in the national interest or necessary to avoid an injustice" (32 C.F.R. 1627.1); he is, therefore, required to express in writing why he believes his appeal is of such nature. We add parenthetically, that the appeal to the President in the instant case was not taken by the State Director, but by the National Director on petitioner's behalf (see pp. 8–9 *supra*). 32 C.F.R. 1627.1(b). A comprehensive statement (A. 69–72) of his reasons for seeking further administrative review was provided by petitioner for consideration by the National Appeal Board. This procedure was entirely consistent with the pertinent regulatory requirements and has not been challenged by petitioner at any time in these proceedings. Rather, petitioner's attack is confined to the actions of the State Director and of the State Appeal Board.

board's classification, due process does not require that he otherwise be permitted to bolster his claim. Nor have we been able to find a single case suggesting otherwise.

The reason is manifest. As pointed out by the dissent below (A. 116), "since the Appeal Board hears and decides each case *de novo*, if the appellant-Director does not choose to frame the issues, the registrant is not at any disadvantage." Under the regulations, appeal boards are instructed to "classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant." 32 C.F.R. 1626.26(a). It is "universally held that the [appeal board's] * * * classification is one of first instance, not a mere affirmance or reversal of the Local Board * * *" (*DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8)). And see *McKart* v. *United States*, *supra*, 395 U.S. at 198 n. 16. The scope of its review, however, is explicitly limited as follows (32 C.F.R. 1626.24(b)):

> In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:
>
> (1) Information contained in the record received from the local board.
>
> (2) General information concerning economic, industrial, and social conditions.

The State Appeal Board followed these restrictions in the instant case.[18] Moreover the record shows that in doing so it did not ignore any material properly to be considered in evaluating petitioner's conscientious objector claim. Not only did his file contain the completed Form 150 (see pp. 5–6 *supra*) and supporting letters from personal references,[19] but, in addition, petitioner had himself filed a lengthy statement with the local board responsive to certain questions that he had been asked during his personal appearance (see Appendix A, pp. 63–66 *infra*), and an attorney had added a separate letter to petitioner's file arguing his case on legal grounds (see Appendix B, pp. 67–71 *infra*).

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[18] Petitioner seeks to equate the "brief" synopsis that was attached to his file by an employee of the State Appeal Board with the FBI reports or the Justice Department recommendation that were involved in *Gonzales* and *Simmons* (Pet. Br. 16 n. 9). The clerical "summary of the registrant's Selective Service file" (A. 89(i)), however, is of a different character; it did not contain independent evidence or additional information relating to petitioner's claim, as did the other documents. Moreover, to the extent that it had any influence on the State Appeal Board's decision, that is a matter that relates directly to the board's exercise of judgment and discretion in evaluating the evidence before it and is thus reserved by Section 10(b)(3) for post-induction judicial review.

[19] The State Appeal Board's refusal to consider subsequently filed supporting letters by the same references was not only procedurally proper (32 C.F.R. 1626.24(b)); it also did not place petitioner at any disadvantage. The subsequent letters were largely repetitive of the views expressed in the letters that were already in petitioner's file (compare C.A. App. 74a, 76a–77a, 79a with A. 48, 49–50, 51–52). Moreover, these subsequent letters, together with a letter written by petitioner in support of the appeal to the National Appeal Board taken on his behalf (A. 69–72), were included in his Selective Service file at the time it was considered by the National Appeal Board.

Both petitioner and the dissenting opinion below (A. 118 n. 10) speculate that the State Appeal Board did in fact base its determination on "[g]eneral information" outside the record before the local board "concerning economic, industrial, and social conditions" (32 C.F.R. 1626.24(b)). If that were the fact, the effect of that action is an issue which must be resolved under the "basis in fact" standard of review for testing the correctness of the classification determination, and only "after the registrant has responded either affirmatively or negatively to an order to report for induction" (50 U.S.C. App. (Supp. V) 460(b)(3)). See *Clark* v. *Gabriel, supra.* It calls for precisely the type of evaluation of administrative judgment and discretion that is barred by Section 10 (b)(3) from preinduction judicial review under the *Oestereich-Breen* construction of the statute.

c. Finally, petitioner contends that the failure of the State Appeal Board to set forth in writing its reasons for assigning him a I-A classification is inconsistent with procedural due process requirements of fundamental fairness.

There is no requirement in the statute or regulations (see 32 C.F.R. 1623.4, 1625.11, 1626.26, and 1627.6) that the various administrative boards of the Selective Service System must accompany their classification decisions with a statement of reasons.[*] More-

[*] The draft bill that is presently pending before the Conference Committee (H.R. 6531, 92d Cong., 1st Sess.) amends the Act by adding subsection 23(b)(4), which provides: "In the event of a decision adverse to the claim of a registrant, the local board or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision."

over, Congress has explicitly excused the agency from such a requirement under the Administrative Procedure Act[41] (50 U.S.C. App. 463(b)). And, it has long been the settled practice of these boards of volunteer laymen to assign registrants a particular classification without explanation. See, *e.g.*, *Witmer* v. *United States*, *supra*; *Dickinson* v. *United States*, 346 U.S. 389.

Where, however, following the local board's classification, there is included in the registrant's file a government recommendation which contains improper legal grounds for denying a conscientious objector claim, this Court has consistently held that a failure of the Appeal Board to state reasons for its denial "must vitiate the entire proceedings" (*Sicurella* v. *United States*, 348 U.S. 385, 392). This is so notwithstanding the fact that there existed proper grounds on which the denial could have rested. See, *e.g.*, *Clay* v. *United States*, No. 783, Oct. Term, 1970, reversed June 28, 1971; *United States* v. *Jackobson*, 325 F. 2d 409, 416–417 (C.A. 2), affirmed *sub nom. United States* v. *Seeger*, 380 U.S. 163; and cf. *United States* v. *Atherton*, 430 F. 2d 741, 746 (C.A. 9). But the present case does not involve that situation.[42]

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[41] That statute provides (5 U.S.C. (Supp. V) 555(e)): "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

[42] Here, no statement of reasons was submitted by the local board (compare *United States* v. *Atherton*, *supra*), and no statement or recommendation was submitted by the government

Petitioner's argument rests on a relatively recent line of authority—all post-induction cases, beginning essentially with *United States* v. *Haughton*, 413 F. 2d 736 (C.A. 9)—holding that the failure of local or appeal boards to give reasons for their denials of conscientious objector claims is fatal where it can be shown, on the basis of the information in the Selective Service file, that the registrant made out a *prima facie* case for exemption. See, *e.g.*, *Scott* v. *Commanding Officer*, 431 F. 2d 1132 (C.A. 3); *United States* v. *Stetter*, C.A. 5, No. 30036, decided June 14, 1971, and the cases collected therein at slip op. p. 24 nn. 6–12. This principle seems "to be based on the salutary desire to supply the district court with a proper record of the administrative proceedings in their review of whether the registrant has met the statutory criteria." *Scott* v. *Commanding Officer*, *supra*, 431 F. 2d at 1138 (Aldisert, J., concurring). As the Ninth Circuit declared in *Haughton*, *supra*, 413 F. 2d at 739:

> * * * Inconsistent statements or actions or a finding of insincerity may support the denial of conscientious status. * * * The local board, however, must state its reasons for the denial of a requested classification when a registrant has

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(compare *Clay* v. *United States*, *supra*). Indeed, the only *legal* discussion concerning the claim was in the attorney's letter written on petitioner's behalf (see Appendix B, pp. 67–71 *infra*). We do not understand petitioner to be arguing, however, that that letter set forth an erroneous legal standard which, because it was before the State Appeal Board, "must vitiate the entire proceedings" (*Sicurella* v. *United States*, *supra*, 348 U.S. at 392).

> "met the statutory criteria" * * * for that classification or * * * has placed himself "prima facie within the statutory exemption." * * * Otherwise a court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statements, even if true, did not entitle him to the classification, or on the reasonable disbelief of certain allegations necessary to the registrant's *prima facie* case. * * *

Accord: *United States* v. *Broyles, supra*, 423 F. 2d at 1303–1304; *Paszel* v. *Laird*, 426 F. 2d 1169, 1175 (C.A. 2); *United States* v. *Lemmens*, 430 F. 2d 619, 623 (C.A. 7); *Scott* v. *Commanding Officer, supra*, 431 F. 2d at 1137; *United States* v. *Crownfield*, 3 S.S.L.R. 3833, 3834–3835 (C.A. 3).

Whatever the propriety of applying that principle to post-induction review, the lack of a statement by the Appeal Board of its reasons for denying a conscientious objector claim that the local board allowed does not justify an exception to the bar of Section 10(b)(3) against pre-induction review of the classifying or processing of registrants. The *Haughton* rule applies only if the registrant has shown that he was *prima facie* entitled to an exemption or deferment. See, *e.g.*, *United States* v. *Findley*, 3 S.S.L.R. 3836 (C.A. 1). That determination calls for precisely the type of judicial appraisal of board action "inescapably involv[ing] a determination of fact and an exercise of judgment" (*Clark* v. *Gabriel, supra*, 393 U.S. at 258) that this Court has held to be impermissible prior to in-

duction (see pp. 21–22 *supra*).[43] To permit preinduction review of the "quantum of evidence" in a registrant's selective service file (*Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 238 n. 7) for purposes of determining whether the appeal board should have explained its action in writing, is, we submit, no more appropriate here than where the preinduction challenge is to a refusal of the local board to reopen on submission of an allegedly *prima facie* claim. See, *e.g.*, *Lane* v. *Local Board No. 17, supra; Ferrell* v. *Selective Service Board, supra; Morgan* v. *Melchar, supra; Blatt* v. *Local Board No. 116, supra; Bookout* v. *Thomas, supra.*

Moreover, it bears repeating that *Oestereich* and *Breen* establish a construction of Section 10(b)(3) that permits preinduction review only where "it [is] plain on the record and on the face of the Act that an exemption had been granted * * *" (*Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 238 n. 7); a mere showing of *prima facie* entitlement to a possible exemption is inadequate.[44]

To recapitulate: Petitioner's claims are not yet ripe for adjudication; his right under the statute to con-

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[43] In Selective Service cases, a *prima facie* case is present "if a registrant has presented facts which, if true and uncontradicted by other information contained in his file, would be sufficient under the regulations [or statute] to warrant granting his requested classification." *United States* v. *Burlich*, 257 F. Supp. 906, 911 (S.D.N.Y.). And see *Mulloy* v. *United States, supra,* 398 U.S. at 416.

[44] Here, petitioner's claim that he was *prima facie* entitled to conscientious objector status is disputed. To be sure, the

scientious objector status is contested; the actions taken by the State Director and the State Appeal Board were not without statutory basis and complied fully with the regulations; and the challenged procedures all involve an exercise of administrative judgment and discretion which is directly related to the merits of petitioner's claim. Any one of these factors might alone be sufficient to bar preinduction review. In combination, they present precisely the type of challenge to "the classification or processing" by Selective Service that Congress determined in Section 10(b)(3) should await judicial review until "after the registrant has responded either affirmatively or negatively to an order to report for induction." 50 U.S.C. App. (Supp. V) 460(b)(3). Under this Court's construction of that provision in *Oestereich, Gabriel,*

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local board awarded him a I-O classification after a review of his file and two personal appearances. But the State Appeal Board, whose "classification must rest solely upon objective facts within the selective service file" (*United States* v. *Abbott*, 425 F. 2d 910, 913 (C.A. 8); and see *Witmer* v. *United States*, 348 U.S. 375, 382), reached the opposite conclusion. Whether there is information in petitioner's Selective Service file—that might have been overlooked or ignored by the local board—which on its face discredits the nature of petitioner's belief concerning war (see *Gillette* v. *United States*, 401 U.S. 437), or the "religious" basis of the objection (*Welsh* v. *United States*, 398 U.S. 333), or petitioner's sincerity (*Witmer* v. *United States*, *supra*), is something that cannot—and should not—be determined in the present preinduction suit. That is an issue which—if petitioner is ever ordered to report for induction—can properly be reviewed when the entire Selective Service file is before the courts, either in a habeas corpus action after induction, if he so chooses, or in defense to a criminal prosecution for refusal of induction, if he should elect that course.

Breen and *Boyd*, that congressional judgment bars preinduction judicial review in this case."

III. AT ALL EVENTS PETITIONER SHOULD BE REQUIRED TO DEMONSTRATE THAT THE MONETARY AMOUNT IN CONTROVERSY SATISFIES THE $10,000 JURISDICTIONAL REQUIREMENT OF 28 U.S.C. 1331

Even if this Court, however, should hold that petitioner's claims are justiciable and warrant preinduction judicial review, we think that petitioner also should be required to establish that the amount in controversy exceeds the $10,000 jurisdictional requirement of 28 U.S.C. 1331.

In suits brought by Selective Service registrants to enjoin their induction, the only available grounds for federal jurisdiction are the general grants of federal question and diversity jurisdiction, both of which apply only where "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs" (28 U.S.C. 1331, 1332). The Administrative Procedure Act does not provide a basis for federal

---

"The "litigious interruption" in processing petitioner has already exceeded two and one half years. Even if he were ultimately to prevail in the instant suit, it cannot be determined on this record whether he is entitled to an exemption from military service. Thus, unlike *Oestereich* and *Breen*, where this Court could conclude with legal certainty that the administrative processing was at an end—petitioner would still be subject to further administrative action. Petitioner himself concedes the point; the relief he now seeks is the chance to supplement the information in his selective service file, "to present his side of the case to the Appeal Board and to make a complete appellate record in support of his conscientious objector status before submitting his claim to a court for final determination" (Pet. Br. 32–33). It is such interference with the administration of the System that Congress has prohibited.

jurisdiction over such suits; Congress has explicitly provided in the Military Selective Service Act that "[a]ll functions performed under this title * * * shall be excluded from the operation of the Administrative Procedure Act * * * [except as to section 3 of the APA, pertaining to publication of agency regulations]" (50 U.S.C. App. (Supp. V) 463(b)).[46] Nor is there any provision in the Military Selective Service Act itself that can be construed as an affirmative grant of federal jurisdiction.[47]

In *Oestereich, supra,* this Court expressly recognized the applicability of the amount-in-controversy requirement in preinduction Selective Service cases. There, after finding that the suit was not barred by Section 10(b)(3), it remanded the case to afford the registrant an opportunity "to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. § 1331." 393 U.S. at 239. See also *Wolff* v. *Selective Service Local Board No. 16, supra,* 372 F. 2d at 826; *Goldsmith* v. *Sutherland,* 426 F. 2d 1395 (C.A. 6), certiorari denied, 400 U.S. 960; *Boyd* v. *Clark, supra,* 287 F. Supp. at 564.

Petitioner seeks to avoid the thrust of this ruling on the ground that he is asserting constitutionally

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[46] Where the Administrative Procedure Act applies, review is available under Section 10 of that statute: 5 U.S.C. (Supp. V) 701–706.

[47] Most regulatory statutes explicitly confer jurisdiction. See generally *Developments in the Law—Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 903–904 (1957). Such was the case in *Aptheker* v. *Secretary of State,* 378 U.S. 500 (see 50 U.S.C. 793) and *Schneider* v. *Rusk,* 377 U.S. 163 (see 8 U.S.C. 1105a), cited by petitioner and *amicus.*

guaranteed rights on which "a monetary price cannot be placed * * * because they are of infinite value and concern and do not conform to the property notion of valuation in monetary amount" (Pet. Br. 38). But Congress has conditioned access to the federal courts on a litigant's ability to establish that his dispute involves a minimum monetary amount "*and* arises under the Constitution * * *" (28 U.S.C. 1331; emphasis added). This has long been interpreted to require that the controversy be capable of valuation in pecuniary terms. See, *e.g.*, *Hague* v. *C.I.O.*, 307 U.S. 496, 529–530;[46] *Yoder* v. *Tribes of Fort Peck Indian Reservation*, 339 F. 2d 360 (C.A. 9).

While the plaintiff need not show an economic loss with absolute certainty (see *e.g. St. Paul Mercury Indemnity Co.* v. *Red Cab Company*, 303 U.S. 283, 289; *Berk* v. *Laird*, 429 F. 2d 302 (C.A. 2); *Parker* v. *Erie-Lackawanna System*, 393 F. 2d 229 (C.A. 7)),[47]

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[46] In *Hague*, involving an injunctive suit against city officials to protect First Amendment rights, a majority of the Court (although disagreeing on a subsidiary point) sustained jurisdiction under 28 U.S.C. 1343(3), on the explicit or implicit premise that jurisdiction did not lie under 28 U.S.C. 1331 (see 307 U.S. at 507–508 (opinion of Roberts, J.), 519, 527–532 (opinion of Stone, J.), 532 (opinion of Hughes, C.J.)). The dissenting justices indicated no contrary view (see 307 U.S. at 532–533).

[47] It has been suggested that, where purely injunctive relief is sought, the amount in controversy may be measured by either "the value of the relief sought to be gained by plaintiff * * * [or] the cost [of enforcing that right] to the defendant." *Hedberg* v. *State Farm Mutual Automobile Ins. Co.*, 350 F. 2d 924, 928 (C.A. 8) (dictum); and see *Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F. 2d 809, 814–816 (C.A. 8).

actions asserting rights not capable of monetary valuation do not satisfy the requirement of jurisdictional statutes prescribing that the matter in controversy exceed a specified dollar sum. See, *e.g.*, *Barry* v. *Mercein*, 5 How. 103 (right of custody of a child); *Youngstown Bank* v. *Hughes*, 106 U.S. 523 (bank's suit to enjoin administrative subpoena which would "unlawfully expose its business affairs" and "lessen public confidence"); *Kurtz* v. *Moffitt*, 115 U.S. 487 (writ of habeas corpus); *United States ex rel. Curtiss* v. *Haviland*, 297 Fed. 431 (C.A. 2) (inquisition of lunacy); *Giancana* v. *Johnson*, 335 F. 2d 366 (C.A. 7), certiorari denied, 379 U.S. 1001 (action to enjoin FBI agents from conducting close surveillance of plaintiff); and cf. *Carroll* v. *Somerveil*, 116 F. 2d 918 (C.A. 2); *Ackerman* v. *Columbia Broadcasting System, Inc.*, 301 F. Supp. 628 (S.D. N.Y.).[50]

The congressional purpose behind Section 1331 might have been simply to keep "petty" cases out of federal courts, as petitioner suggests (Pet. Br. 35–36). And this case may be viewed as involving a "substantial" enough claim to warrant the attention of the federal judiciary (see S. Rep. No. 1830, 85th Cong., 2d Sess., pp. 3–4). Nevertheless, to achieve its purpose Congress adopted a monetary standard, which the courts are not free to ignore in a particular situation where it operates to bar civil cases that otherwise

[50] But see *Cortright* v. *Resor*, 3 S.S.I.L.R. 3799, 3804 (E.D. N.Y.), appeal pending, C.A. 2, No. 71–1365; *Moylan* v. *Laird*, 305 F. Supp. 551, 553 (D. R.I.); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1276 (S.D.N.Y.); *Murray* v. *Vaughn*, 300 F. Supp. 688 (D. R.I.); *Faulkner* v. *Clifford*, 289 F. Supp. 895, 899–901 (E.D.N.Y.).

bring into question significant federal rights. In various Civil Rights Acts and in other statutes Congress has conferred federal jurisdiction without regard to the amount in controversy. *E.g.*, 28 U.S.C. 1343, 1344, 1337, 1338, 1339, 1340, 1346; 46 U.S.C. 688 (Jones Act); 45 U.S.C. 51 *et seq.* (Federal Employers' Liability Act). That Congress has not done so for cases like this one may well result in an "unfortunate gap in the statutory jurisdiction of federal courts." *Wolff* v. *Selective Service Local Board No. 16, supra,* 372 F. 2d at 826.[51] But that seems to be the effect of the plain language of Section 1331.

It is contended, however, that the jurisdictional amount limitation is unconstitutional as applied to any case challenging the action of a federal official, at least where a constitutional claim is asserted. But, since petitioner argues that he "can sustain his jurisdictional allegation" (Pet. Br. 39), and the question has not yet been resolved by the courts below (see A. 111), there is no occasion for this Court now to decide whether, if he should fail to establish the requisite amount in controversy, an application of Section 1331 in such circumstances to bar preinduction judicial review would be constitutional. See *Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 239.

Accordingly, even if petitioner should prevail on the other issues in this case, we think it appropriate for

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[51] And see ALI, *Study of the Division Between State and Federal Courts* 172 (1969); C. Wright, *Federal Courts*, § 32 at 110 (1969); Currie, *The Federal Courts and the American Law Institute* (Part II), 36 U. Chi. L. Rev. 268, 296 (1969).

this Court to remand to give him an opportunity to prove his allegation that more than $10,000 is in controversy here.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed. Should this Court reverse the judgment below, the cause should be remanded to the district court with directions to hold a hearing on the merits of the complaint, including the question of the jurisdictional amount required by 28 U.S.C. 1331.

Respectfully submitted.

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JULY 1971.

APPENDIX A

Statement to Local Board No. 7
May 22, 1968

I would like to review several points which you raised at our first meeting on November 15, 1967. When we talked at that time, you wanted to be certain that I understood the consequence of being a conscientious objector, namely, the necessity of doing alternative civilian service. I indicated to you my willingness to do civilian service, particularly in the poverty concentrated areas of our country. I indicated that I felt an obligation to serve my country, but that my conscience would not permit me to do so in the military. My Form 150 pointed out that I presently live and work in the poor community in Cleveland; that the health needs of poor people in this country press deeply on my conscience. For these unmet health needs represent to me an unintentional genocide which becomes more intentional as additional facts are uncovered exposing the inadequate health care received by the poor. However, since that first meeting with you, an additional consequence of my conscientious objector's position has become apparent to me. That is, the possibility that my conscience and beliefs may lead me to be jailed up to five years and may make it impossible for me to obtain a medical license to practice in any state in our country. At this juncture, I am willing to take this consequence, if this local board says that I must. I cannot and I will not violate the dictates of my conscience.

Many of the questions you raised at our first meeting centered about the nature of my religious training and belief. Was I a member of a "peace church", such as the Quakers? What doctrinal basis for my beliefs are there in the Lutheran Church? Was my belief "a merely personal moral code"? Let us take these questions individually. First, as I stated during our November meeting, I am not a Quaker, although I have been influenced by Quaker philosophy and tradition. However, membership in a "peace church" is not a requisite for consideration as a conscientious objector, as I learned through study and discussion with Mr. Ralph Rudd, an attorney. I wish to quote from a letter by him to you, in which Mr. Rudd cites the case of the *US vs. Seeger:*

> "In adopting the 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect if the claimant's own opposition to war was based on 'religious training and belief'."

Second, you mentioned in our November meeting that you had not known of any Lutherans who took a conscientious objectors position, neither were you aware of any doctrine in the Lutheran Church that opposed war. Since our meeting, I have become familiar with a group called the Lutheran Peace Fellowship, which is an organization of Lutherans who hold a conscientious objectors status. Thus, others who have received their religious training within the Lutheran Church have been led by their religious training and belief to the same position I have, and other local boards have recognized this position. I have also talked with the Rev. Raymond Miklethun, Lutheran Campus pastor at Case-Western Reserve University about my conscientious objection. Let me read from the letter he has written to you:

> "Men who have come out of a Lutheran training have been taught that there are limits on participation in war for every Christian. This statement from the Augsberg Confession, Article XVI is typical. 'Our churches teach that lawful civil ordinances are good works of God, and that it is right for Christians to engage in just wars . . . But when commands of civil authority cannot be obeyed without sin, we must obey God rather than man.'"

Third, since I presently lack membership in the Lutheran Church, you raised the question, is my objection based on "a merely personal moral code"? It is certainly true, that my beliefs do constitute a personal moral code, for what value is any religious belief if it is not held to be relevant and binding to the individual? But it is not merely a personal moral code, as I pointed out in my Form 150, since my beliefs "are ideals which emanate from centuries of religious tradition". That there is a position between membership in an organized church and a merely personal moral code was established in the *US vs. Seeger* case, in which it was said:

> "The Congress recognized that one might be religious without belonging to an organized church just as surely as minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war."

The court goes on to say, that "individual belief" establishes the eligibility for conscientious objection and that the test of belief "is whether a given belief . . . occupies a place in the life of its possesser parallel to that filled by the orthodox belief in God . . ."

In conclusion, I maintain that my religious training has nurtured within me a set of beliefs about the quality of "goodness" in all men, which imposes certain duties on my conduct. Thus my beliefs have directed my life: where I live, with whom I work, the type of work that I do. It is this set of beliefs that lead me to be conscientiously opposed to war, and willing to accept the consequences, alternative service or jail.

OLIVER FEIN.

APPENDIX B

Selective Service Local Board No. 7
45 South Broadway
May 21, 1968

Re: Oliver Thomas Fein,
Selective Service No. 30–7–40–172.

GENTLEMEN, I'm writing on behalf of the above named registrant to try to clarify what seems, by his report, to be a confusion with respect to the law governing eligibility for classification as a conscientious objector.

Dr. Fein advises me that in an informal conference with the Local Board on November 15, 1967 the Board expressed doubts as to his eligibility for classification as a conscientious objector, the doubt arising from the fact that although he was brought up in the Lutheran church he does not say that he is a Lutheran now and cannot say that conscientious objection is required of its members as a part of the doctrine of the Lutheran church.

If Dr. Fein and I understand correctly what your view of the law is, I am compelled to say on his behalf that your view seems to be mistaken.

As you know, the present statute with respect to conscientious objection is substantially identical with the Act of 1940. Shortly after the 1940 Act, two cases were decided by the United States Court of Appeals for the 2nd Circuit, the very Circuit in which your Board is located, that made it very clear that a registrant does not need to be a member of any established church or to follow the beliefs of any such church in order to be eligible for classification as a conscientious

objector, since the law looks to the registrant's own individual beliefs. These cases were *U.S.* v. *Kauten,* 133 F.2d 703, 1943 and *U.S.* v. *Downer,* 135 F.2d 521, also decided in 1943.

In the *Downer* case the court referred to the fact that the 1917 Draft Law had required membership in a well recognized religious sect or organization whose existing creed or principles forbidded its members to participate in war in any form. The court pointed out that the 1940 Bill had originally contained the same provision but before enactment was amended to its present form in order to secure greater protection for individual beliefs. Membership in an established church or the following of its beliefs was not intended as a requisite, a view which was repeated on the floor of Congress, the court said. The court then referred to the *Kauten* case as follows:

> "Hence we said in the Kauten case, 133 F.2d at page 708: 'The provisions of the present statute are more generous, for they take into account the characteristics of skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed the basis of exemption.' "

In *White* v. *United States,* 215 F.2d 782, 9 Cir., 1954 the court summarized the law as follows in its footnote number 2:

> "It is noted that the exemption authorized by section 6(j) of the Act, 50 USCA appendix, section 456(j) is based upon the religious belief of the particular individual, not upon the religious tenets of an organization of which he is a member. The reference is to 'an individual's belief.' See *Gonzales* v. *U.S.,* 6 Cir., 212 F.2d 71, 72: '* * * members of the sect are not necessarily, by virtue of their membership, conscientious

> objectors, but each determines, according to his own conscience and according to his interpretation of the Bible, whether he may conscientiously engage in military service. 'In *United States* v. *Simmons,* 7 Cir., 213 F.2d 901, 904, it is said: 'Affiliation with a particular religious sect does not per se entitle a registrant to conscientious objector status. The duty imposed on the boards is to determine subjectively and objectively the sincerity of the individual's belief, not the nature of the teachings of any religious faith.'"

The case of *In Re Hansen,* 148 F.Supp. 187, USDC Minn., 1957, was an immigration case. The applicant was a conscientious objector and asked to take the naturalization oath promising to perform work of national importance under civilian direction when required by law instead of to bear arms. The examiner had held that the immigration statute, 8 USCA Section 1448(a) required that the conscientious objection be based upon religious training and belief and that the applicant had shown that while he had been brought up a Lutheran and was still a devout Lutheran, the doctrines of his church and his religious training in it did not oppose war. The court overruled the examiner's view and said that Hansen was entitled to naturalization. The court reasoned that the term "religious training and belief" as used in the statute is one concept not two and was defined, just as it was in the draft law, as "an individual's *belief* in relation to a Supreme Being involving duties superior to those arising out of any human relation, . . ." Quoting Judge Aldrich in the case of *In Re Nissen,* 138 F. Supp. 483, the court indicated that the training referred to in the statute is a mere background against

which the person's sincerity could be tested. Then the court made the following statement:

> "It seems to me that to ascribe any more meaning to 'training' than it already contained in the statutory definition would be to permit only those who are members of religious sects which are doctrinally opposed to war to claim the exemption from the full oath required by the statute. It is quite clear that when Congress employed the term 'religious training and belief' it did not contemplate only members of those religious groups. *U.S.* v. *Kauten*, 2 Cir., 133 F.2d 703, 708; *U.S. ex. rel. Phillips v. Downer*, 2 Cir., 135 F.2d 521, 524. If such were the case, I would find myself in the untenable position of denying citizenship *because* the petitioner is a Lutheran despite the fact that his beliefs opposing war may well be as devout as those of the Jehovah's Witnesses or the Mennonites. See *U.S. v. Evengram*, D.C.S.D.W.Va., 102 F.Supp. 128."

Let me call your attention next to the celebrated case of *United States v. Seeger*, 380 U.S. 163, 13 L.ed.2d 733, 85 Sup.Ct. 850, 1966, a United States Supreme Court decision that also arose in the 2nd Circuit. In the first place the court expressly said; at 380 U.S. 171:

> "In adopting the 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect if the claimant's own opposition to war was based on 'religious training and belief'."

In the second place, the entire discussion by the Supreme Court in the *Seeger* case makes it clear that the eligibility of a registrant for classification as a conscientious objector depends entirely upon his own individual beliefs, not upon membership in any organized religious body nor adherence to its doctrines.

The problem in the *Seeger* case was what kind of individual belief would satisfy the test of being religious. The court concluded, 380 U.S. at 176:

> "Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well established Congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."

I believe no further citation or quotation of the law is needed. It seems to be completely clear that Dr. Fein's lack of membership in the Lutheran church at present, although he was brought up in it and traces his fundamental Christian training to that experience, is not a controlling factor at present. What controls his eligibility for the conscientious objector's classification is that he is at present on the *basis* of his religious training and belief conscientiously opposed to participation in war in any form. I think he had made it very clear that this is the fact and that he is enormously sincere in his expression of this belief. The law quite clearly requires him to be classified as a conscientious objector, as he requests.

Sincerely yours,

RALPH RUDD.

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Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-58

OLIVER T. FEIN,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM
LOCAL BOARD No. 7, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Dated: October 7, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-58

OLIVER T. FEIN,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 7, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

I.

Preliminarily we note the recent amendment by Congress of the Selective Service Act of 1967. By this amendment, particularly §22 entitled "Procedural Rights," Congress has explicitly recognized that registrants are entitled to a fair hearing by the appeal board consistent with the requirements of procedural due process.

The preamble to §22 expressly confirms this, and what we stated in Point II of our principal brief; namely, that it was and is the intention of Congress to "guarantee to each registrant asserting a claim before a local or appeal board,

a fair hearing consistent with the informal and expeditious processing which is required by selective service cases." Pursuant to §22 the President is authorized to adopt regulations implementing specific procedural rights, among which are the following:

> "(1) Each registrant shall be afforded the opportunity to appear in person before the local or appeal board of the Selective Service System to testify and present evidence regarding his status.
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> • • • • •
>
> "(4) In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision."

These provisions make clear that the summary appeal process to which petitioner was subjected was not consistent with the underlying, albeit implicit principles of fairness that were intended by Congress to govern prior to the 1971 amendments. The applicability to petitioner of the 1971 amendments presents a simple and direct claim of statutory right for which preinduction judicial review is unquestionably available. For if these amendments are applicable, it must be found that the summary process employed by the appeal board contravened an unambiguous mandate of the Selective Service Act, as did the actions of the boards in *Oestereich* v. *Selective Service*, 393 U.S. 233; *Breen* v. *Selective Service*, 396 U.S. 460.

II.

Respondents urge affirmance principally on the basis of *Clark* v. *Gabriel*, 393 U.S. 256. There the Court held that §10(b)(3) of the Selective Service Act of 1967 precludes preinduction judicial review "of the classification or processing of any registrant" in, as respondents state, "the generality of situations where the local and appeal boards have applied their judgment and exercised their discretion" (Res. Br. p. 23).[1] But this case, by respondents' own admissions, involves review of neither the "classification or processing" of petitioner in the Selective Service System, nor the discretionary action of any of its officials.

Respondents concede at the outset of their brief that unlike *Gabriel*, "this Court is not now called upon to determine whether petitioner's assigned classification is wholly without factual basis" (Res. Br. p. 13). Plainly, as respondents recognize (Res. Br. pp. 13, 56 n. 45), petitioner's challenge on procedural due process grounds does not call for judicial review of any judgmental or discretionary act by Selective Service officials in determining petitioner's classification or the manner in which he will be processed for induction. Compare *Gregory* v. *Tarr*, 436 F.2d 513 (6th Cir. 1971); see also Mr. Justice Harlan's concurring opinion in *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 240-242. The summary process employed by respondents in revoking petitioner's conscientious objector status is challenged in this suit as being facially invalid under the Due Process Clause of the Fifth Amendment. Since that process was clearly dictated by the governing regulatory,

[1] "Res. Br." references are to the Brief for the Respondents.

if not statutory, provision, no discretionary acts on respondents' part are involved.[2]

Respondents also acknowledge that the procedures challenged by petitioner as depriving him of a "fair and just"[3] administrative appeal are "like the classification procedures questioned in *Oestereich* and *Breen* . . ." (Res. Br. p. 34). Respondents labor in an attempt to distinguish *Oestereich* and *Breen* from this case, but only succeed in raising distinctions of a wholly technical, if not unreal, nature. Respondents completely fail to make the crucial demonstration, namely that there is some valid reason why

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[2] While we agree with decisions such as *Hunt* v. *Local Board*, 438 F.2d 1128 (3rd Cir. 1971), we have not, contrary to respondents' view (Res. Br. p. 28 n. 23), based our case on such decisions. Cases such as *Hunt*, involve review of discretionary judgments by local and appeal boards, and are therefore fundamentally distinct from this case.

Nor are the decisions in *Gregory* v. *Tarr*, *supra*, and *Evans* v. *Local Board*, 425 F.2d 323 (10th Cir. 1970), upon which respondents rely (Res. Br. p. 28 n. 22), contrary to our position. Preinduction review in both *Gregory* and *Evans* was denied after the courts found that the boards had been delegated discretion in determining the substantive criteria to be applied to the respective claims for III-A and II-S deferments and had exercised that discretion within the statutory authorization. Once having determined that the registrants' attack in court was directed exclusively at the propriety of the boards' exercise of discretion, the courts concluded that §10(b)(3) barred further review on the issue of abuse of discretion. Respondents concede in our case that petitioner's challenge is directed exclusively to the procedural fairness of the appeal process and therefore in no way calls upon this or any court to engage in a preinduction review of any act of discretion or judgment by the appeal board.

[3] The summary revocation of petitioner's conscientious objector status deprived petitioner of fundamental procedural rights guaranteed by the Due Process Clause of the Fifth Amendment and it also conflicts with the explicit Congressional command that the system of military selection be "fair and just." See §1(c) of the Selective Service Act of 1967, 50 U.S.C. App. §451(c).

§10(b)(3) should be read to permit preinduction review in *Oestereich* and *Breen* and to preclude such review here.

Indeed, in light of the Congressional purposes behind §10(b)(3) petitioner presents a far more compelling case for preinduction judicial review than did either *Oestereich* or *Breen*. Two concerns prompted the enactment of §10(b)(3): (i) the "inclination of the courts to prematurely inquire into the classification action of local boards" before registrants have exhausted their administrative remedies; and (ii) the possibility for "litigious interruptions" of the military selection process resulting from preinduction judicial review of discretionary decisions by Selective Service officials. See footnote 5, *infra*. In both *Oestereich* and *Breen* the Court concluded that despite these Congressional concerns §10(b)(3) should not be applied to preclude a preinduction claim by a registrant that he was reclassified I-A on the basis of substantive criteria which were not authorized by statute, or, if so authorized, were in violation of the First and Fifth Amendments. Such a

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[4] H. Rep. No. 267, 90th Cong., 1st Sess. 30-31; see also S. Rep. No. 209, 90th Cong., 1st Sess. 10. As these reports point out, Congress sought to reiterate the rule established in *Falbo* v. *United States*, 320 U.S. 549 as interpreted in *Estep* v. *United States*, 327 U.S. 114. That rule is not a superficial one of timing, as respondents claim (Res. Br. p. 14), but rather is one of exhaustion of administrative remedies. See *McKart* v. *United States*, 395 U.S. 199, 202-203. Here petitioner has exhausted all his administrative remedies and therefore his action for preinduction review is not in any sense premature. All that is involved in this case is whether petitioner must undergo criminal prosecution or relinquish his liberty by submitting to induction so that he can establish in court that he was denied procedural due process by the appeal board. Petitioner's challenge is fixed and unavoidable; respondents offer no reason why judicial review the day before induction is inappropriate and why such review the day after when petitioner is a conscripted conscientious objector or more likely a criminal defendant is required by §10(b)(3).

claim does not require exhaustion of administrative remedies (Cf. *McKart* v. *United States, supra* at 202). Nor, does its resolution entail review of the board's exercise of discretion and therefore does not pose the danger of "litigious interruption" against which §10(b)(3) was directed.

Petitioner's challenge is more fundamental than those presented in *Oestereich* and *Breen*; it goes to the very integrity of the decision-making process at the appeal stage of the Selective Service System. The challenge here is that the basic administrative procedures did not provide rudimentary fairness. A process which culminates in an individual's loss of substantial liberty, as the Selective Service appeal process surely must in this case, should at the very least provide for notice of issues, an opportunity to submit a written response, and, in cases where the decision is adverse to the individual's position, a statement of the reasons for that decision.

Although petitioner has in fact exhausted his administrative remedies, the inherent unfairness of these remedies makes exhaustion unnecessary since his procedural due process claims are not within the special competence and expertise of the administrative boards to adjudicate. (See *McKart* v. *United States, supra* at 193-194, 198; *Oestereich* v. *Selective Service, supra* at 242; *Unglesby* v. *Zimmy*, 250 F. Supp. 714, 717 (N.D. Cal. 1965), and, in the absence of minimal procedural safeguards, his substantive claim for conscientious objector status would not be fairly or fully considered. Thus the principal purpose behind §10(b)(3), to ensure exhaustion of administrative remedies is not applicable to this case. In analogous cases, where, as here, Congressional concern is manifested for the autonomy, finality and uninterrupted process of administrative agency

proceedings, judicial relief in advance of completion of the administrative process has always been available to review procedural due process claims, whose nature is such that, as Chief Justice (then Circuit Judge) Burger ruled,

> "on its face the contemplated hearing or other administrative process, if consummated, would be set aside on review on procedural grounds." *Wolf Corporation* v. *SEC*, 317 F.2d 139, 143 (D.C. Cir. 1963).

Moreover, as respondents concede, no discretionary[5] decision is called into question here, and, therefore, as in *Oestereich* and *Breen*, no danger of litigious interruption is present.[6]

The "lawlessness" that inheres in the appeal board's summary revocation of petitioner's conscientious objector

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[5] This Court, as well as the lower federal courts, have consistently refused to apply the doctrine of administrative exhaustion, where the deficiencies in the administrative remedies are of a fundamental procedural nature, as they are in this case. See *Meyers* v. *Bethlehem Corp.*, 303 U.S. 41, 48-50; *NLRB* v. *Marine Workers*, 391 U.S. 418, 426 and n. 8; *Rosado* v. *Wyman*, 397 U.S. 397, 406-407; *Reed* v. *Franke*, 297 F.2d 17, 20-21 (4th Cir. 1961); *Unglesby* v. *Zimny*, 250 F. Supp. 714, 717 (N.D. Cal. 1965); 3K. Davis, *Administrative Law Treatise* §20.07 (1958).

[6] If there has been "litigious interruption" in this case, in the sense that petitioner's claim of right still awaits resolution, it is entirely due to respondents' interposition of the §10(b)(3) bar to judicial review. Clearly, had the district court been permitted to reach the merits, the due process issues presented here would have been settled long ago, in far less time and with far less of a burden on the judicial process than if the issues had been adjudicated in the course of a criminal prosecution. Moreover, it is difficult to understand how the induction process may have been interrupted by this litigation, as respondents contend (Res. Br. p. 56 n. 45), where that process has been voluntarily stayed by respondents themselves, who have found it unnecessary to issue a new induction order until this action has been decided.

status is clearly of a more fundamental character than that involved in *Oestereich* and *Breen*. In the absence of procedural safeguards, particularly the right to a statement of reasons, no one, neither the petitioner nor the Court, can determine even whether petitioner, like *Oestereich* and *Breen*, was reclassified on the basis of extraneous substantive criteria, specifically, in this case, petitioner's lawful association with the Students for a Democratic Society.

The summary procedures followed by the appeal board prevented petitioner from adequately presenting his side in support of his conscientious objector status and therefore rendered the administrative record inherently and constitutionally insufficient as a basis for judicial review on the substantive merits of his 1-A classification. This respondents concede.[7] Essentially, petitioner commenced this action to secure the opportunity to make a full administrative record in support of his conscientious objector status.

Respondents offer no explanation, in terms of the practicalities involved in the administration of the Selective Service System, as to why petitioner, unlike *Oestereich* and *Breen*, must undertake the risks and burdens of criminal prosecution or forego his liberty and his religious and moral scruples in order to obtain a judicial determination that the appeal board must abide by fundamentally fair procedures in reviewing his qualifications for conscientious objector status. Surely no one would suggest that §10(b)(3) serves a legitimate interest in making judicial review

[7] Respondents state: "Even if he [petitioner] were ultimately to prevail in the instant suit, it cannot be determined on this record whether he is entitled to an exemption from military service" (Res. Br. p. 56 n. 45).

so costly that many registrants are coerced into acquiescing in the System's procedural violations.[8]

Respondents' brief is also silent when it comes to the question of whether any institutional interests are served at all by barring preinduction judicial review in this case. In fact, allowing such review would greatly serve the interest of both the efficient functioning of the induction and military training processes and the conservation of judicial resources. Because of the inherent insufficiency of the administrative record (Res. Br. p. 56, n. 45), the relief petitioner seeks (or would seek at any time) is an order remanding the case to the Appeal Board with directions that it abide by fair procedures. To require a criminal prosecution in order to obtain such relief is plainly a costly and inefficient method of proceeding. This is especially true where a single preinduction suit can expeditiously

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[8] See also, *Ex Parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952); *Estep* v. *United States*, 327 U.S. 114 (Mr. Justice Murphy concurring).

Similarly, as the Solicitor General pointed out in his brief in *Oestereich*, pp. 60-61:

> "It is *possible* to have review only through criminal prosecution, or through habeas corpus, and to have the ministerial exemption recognized at that point. But there are difficulties. After a draft board issued a notice of induction, a registrant is surely in peril if he refuses to comply with it, and he may find himself effectively in the service, if he does comply with it. It might be claimed that he had waived his exemption by responding affirmatively to induction [see *Gibson* v. *United States*, 329 U.S. 338 (1946)], and he may be held not to have exhausted his administrative remedies if he refuses to accept induction. See *Falbo* v. *United States*, 320 U.S. 549, 553. Moreover, he does not have an opportunity to find out in advance whether he is wrong, and to decide then whether to take the penalty or to accept the legal conclusion as to his status. He must take the risk in order to find out whether he is subject to a penalty."

resolve the procedural issues in petitioner's case, as well as in the cases of all those registrants similarly situated. A preinduction suit also avoids disruption of the military training program and the serious possibility that an inductee claiming unlawful deprivation of his conscientious objector status would be placed in a situation of having to disobey a military order which he deems violative of his religious and moral scruples.[9] Finally, preinduction review of procedural challenges would permit the speedy return of the registrant to the selective service for reprocessing.[10] This would eliminate the possibility that a registrant can avoid his military obligations altogether by raising his procedural challenge in a post induction proceeding, thereby delaying resolution of that challenge until after his 26th birthday.

Basically, respondents claim that the rule established by *Oestereich* and *Breen* applies only to cases where "(1) The registrant fully qualified for a statutory exemption

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[9] See *Noyd* v. *Bond*, 89 S. Ct. 478.

Significantly, no assurance is given under military regulations that inductees who claim in a habeas corpus proceeding the illegality of their 1-A classification and that they are entitled to conscientious objector status will be permitted to abstain from military training exercises and duties. Compare DoD No. 1300.6 §VI(B) (May 10, 1968); and see *Ehlert* v. *United States*, 402 U.S. 99, 106 n. 9.

[10] This was the course followed in *Wiener* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969). The registrant in that case raised a due process procedural challenge to the appeal process, identical to that raised here by petitioner. After holding that the suit was not barred by §10(b)(3), the court ruled that the summary process violated the Due Process Clause of the Fifth Amendment and remanded the case to the appeal board with orders that it proceed consistent with the court's decision. No appeal was taken by the Government from that ruling. No reason appears for the Government's adherence to a different policy in this case with respect to the applicability of §10(b)(3) to due process procedural claims.

[or deferment] . . . (2) the [board revoked] that exemption [or deferment] by a delinquency classification [or on the basis of some other substantive ground not authorized by statute].[11] (3) The challenged local board action had concededly been based on behavior by the registrant completely extraneous to the board's evaluation of the claimed exemption [or deferment]." (Res. Br. p. 21). It should immediately be noted that the third factor respondents list is merely the particular impropriety involved in *Oestereich* and *Breen* and is not involved in the I-S cases. Moreover, listing separately the third factor reflects the confusion manifest throughout respondents' argument between the nature of a preinduction claim that is not barred by §10(b)(3) and the question of whether the registrant can establish the substance of such a claim upon a hearing on the merits.[12] Finally, respondents neglect to list a fourth factor on which they rely in attempting to differentiate this case from *Oestereich* and *Breen* (Res. Br. p. 36): that the denial of preinduction review "clashes" with another provision of the Act *or* is unnecessarily harsh.

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[11] This would include the unauthorized action of local boards to refuse I-S student deferments in cases like *Carey* v. *Local Board*, 297 F. Supp. 252 (D. Conn.), aff'd, 412 F.2d 71 (C.A. 2). See Res. Br. p. 27.

[12] A clear example is respondents' discussion of *Swift* v. *Director of Selective Service*, 3 S.S.L.R. 3839 (D.C. Cir. 1971) (Res. Br. p. 29 n. 23). While, contrary to respondents' claim, we did not rely on *Swift*, it should be noted that the second *Swift* decision, after *Ehlert* v. *United States*, 402 U.S. 99, did not disavow the earlier position taken by the court, but merely recognized that *Ehlert* eliminated the registrants' claim and the basis for preinduction review.

Similarly in *Stella* v. *Selective Service*, 427 F.2d 887 (2d Cir. 1970), the court intimated no view of the propriety of preinduction review of the registrant's claim, but concluded under the facts that the registrant, in effect, had no standing to raise the claim.

Again in *Green* v. *Selective Service Board*, 419 F.2d 813 (8th Cir. 1969), the court concluded that administrative discretion was

There is no indication, however, in either *Oestereich* or *Breen* that they be read as narrowly as respondents contend. On the contrary, in those cases the Court spoke in broad terms authorizing preinduction judicial review whenever a board's action is "blatantly lawless." Surely, as *Oestereich* makes clear, lawless action includes that action which violates constitutional, as well as statutory, commands. Thus, the Court noted the serious constitutional attack raised against the delinquency provisions in *Oestereich*, but found it unnecessary to decide that issue because the delinquency reclassification constituted a "clear departure by the Board from its statutory mandate." *Oestereich* v. *Selective Service Board, supra* at 238; *Breen* v. *Selective Service Board, supra* at 467. It would demean the registrant's constitutional right to procedural due process to say that judicial redress for its violation will not be as swift and sure as that provided when the board reclassifies on the basis of substantive criteria that is not authorized by statute.

In contrast to respondents' present interpretation is the Solicitor General's argument in *Oestereich* (Brief, p. 14) that §10(b)(3) should be construed in a manner consistent with the well established line of cases holding that judicial

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involved in the establishment of an order of call, and therefore §10(b)(3) was a bar. See also the cases relied on by respondents involving preinduction review of a board's refusal to reopen (Res. Br. pp. 28-29).

It is significant that in these decisions the courts did not find it necessary that the registrant be unquestionably qualified for the status he sought. Moreover, as these cases indicate, the courts must preliminarily determine that there is merit to a claim of blatant lawlessness. But there is no requirement that the claim be established beyond question, as respondents would have it, as a predicate for the court to exercise jurisdiction.

review is available to check an administrator who acts in *excess* of his statutory authority. With respect to §10(b)(3), the Solicitor General pointed out, "that there is room for an appropriate distinction between an order which is contrary to the terms of a statute and an order which is challenged only on the ground that the Board has misapplied or abused its authority in making its judgment." Cf. *Harmon* v. *Brucker*, 355 U.S. 579, 581-582; *Leedom v. Kyne*, 358 U.S. 184, 188. *Harmon* relied on *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 159, 160, where a principal claim was that the summary administrative procedure violated the constitutional right to procedural due process, or was not authorized by governing statutes. Preinduction review is certainly appropriate in this case, where no act of discretion was involved, and where the appeal board's procedures and the state director's authority to appeal are challenged as violative of constitutional and/or statutory commands.

Furthermore, petitioner's challenge fully satisfies even respondent's narrow formulation of the *Oestereich, Breen* rule.

First, petitioner's grant of conscientious objector status by his local board is deemed "final" and unconvertible unless "an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." 50 U.S.C. §460(b)(3). Petitioner therefore has a clear, statutory right to his conscientious objector status, as did *Oestereich* and *Breen* to their exemptions and deferments. The classification status in each case was revocable, at all times, but only where the revocation was undertaken in accordance with constitutionally valid and statu-

torily authorized procedures. In this case, as in *Oestereich* and *Breen*, the challenge is directed exclusively to the validity and authorization of those procedures.

Second, as in *Oestereich* and *Breen*, petitioner's claim that the procedures by which his conscientious objector status was revoked, including the absence of a fair hearing and authority of the State Director to initiate an appeal in these circumstances, is essentially a claim that the respondents exceeded their statutory and constitutional authority.

Third, the procedures challenged here, as in *Oestereich* and *Breen*, are in no way related to the factual and discretionary considerations involved in the appeal board's evaluation of petitioner's entitlement to his conscientious objector classification. Essentially, petitioner challenges the predicate for that evaluation; namely, the procedures governing the fact-finding and decision-making function of the board. Therefore his claim is separate and apart from the board's evaluative functions, far more so than were the claims in *Oestereich* and *Breen* that the board's evaluation involved extraneous information.

Fourth, respondents make a basic error in assuming that preinduction judicial review is authorized only in situations where the enforcement of §10(b)(3) would "clash" with the statutory command that exempt and deferred registrants shall not be subjected to military training and service. Clearly, since Oestereich and Breen always had the option of refusing induction, it cannot be said that the "clash" between the requirements of §10(b)(3) and the Act's other mandates was unavoidable. In fact, the Court in *Oestereich* and *Breen* made it clear that where no "clash" exists, as in

the case of a registrant who refuses induction, preinduction judicial review is still available. Thus, the Court ruled that to compel registrants whose exempt or deferred status was revoked under plainly illegal procedures to raise that illegality as a defense in a criminal prosecution would be "to construe the Act with unnecessary harshness." 393 U.S. at 238.

If §10(b)(3) is enforced here and petitioner is compelled to submit to induction in order to raise his claims that his conscientious objector status was revoked without procedural due process, such an application of §10(b)(3) will not only "clash" with various statutory mandates, that petitioner "shall . . . not be subject to combatant training and service" [50 U.S.C. §456(i)], that his local board's grant of conscientious objector status is "final" unless revoked under authorized procedures [50 U.S.C. §460(b)(3)], and that he be treated in a fashion that is "fair and just" [50 U.S.C. §451(c)], but that application also will "clash" with the implied (now express under the 1971 amendment) statutory "policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors . . ." *United States* v. *Gearey*, 368 F.2d 144, 150 (2d Cir. 1966); and the requirement "of procedural regularity and basic fair play." *Gonzales* v. *United States*, 248 U.S. 407, 412. Moreover, such an application of §10(b)(3) will "clash" with the mandate of the Fifth Amendment that no person shall be subject to a loss of liberty without due process of law.[18]

[18] Respondents argue that petitioner's induction will not necessarily clash with other statutory provisions since he is merely vouchsafed from "combatant training and service." This statutory protection is by no means as minor as respondents imply. It represents a Congressional recognition of petitioner's deeply held religious

Alternatively, it would be to construe §10(b)(3) with "unnecessary harshness" if it were read to force petitioner to refuse induction and subject himself to criminal prosecution in order to protect his due process rights. Cf. *Hammond* v. *Lenfest*, 398 F.2d 705, 714 (2d Cir. 1968). Nothing is gained by such an application of §10(b)(3), and as we have shown much is lost in terms of the judicial time and energy expended in such cases and the disruption caused to the military selection and training process.

Respondents make an extended effort to discredit a series of decisions in the Eighth Circuit, which involve the application of regulations governing the induction processing machinery, and the *Hunt* decision of the Third Circuit (Res. Br. pp. 28, 30). But those decisions, however correct or incorrect, are totally unrelated to this case. First, the challenge here does not involve mere "processing" procedures, but rather constitutional procedures, the absence of which undermines the very integrity and credibility of the board's decision-making function. Second, *Hunt* involved review of a board's exercise of its judgmental powers; respondents concede that no such review is involved in this case.

Respondents' efforts with respect to these completely irrelevant cases places in relief their total failure to dis-

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principles which do not permit him to engage in "combatant training and service." While other registrants may be spared *all* training and service, it should be remembered that most of these registrants are merely deferred and will at some later date become fully liable for induction. Moreover, it is evidence of the importance Congress has attached to C.O. deferment that unlike many other deferments, Congress has steadfastly refused to limit or eliminate the rights of C.O.'s to be relieved of combatant training and service.

cuss cases on which petitioner relies, in which were raised procedural due process challenges almost identical to those presented here, and in which preinduction judicial review was authorized. See *Weiner* v. *Local Board,* 302 F. Supp. 266 (D. Del. 1969) (preinduction review of a registrant's claim that the failure to be apprised of the basis for the appeal by the State Director from the local board's classification deprived him of adequate notice and a fair hearing before the appeal board); *Slettehaugh* v. *Tarr,* 322 F. Supp. 180 (D. Minn. 1971) (preinduction review of a claim that the summary treatment of his appeal by the appeal board deprived him of a "meaningful, thoughtful review" to which he was entitled under principles of due process); *Murray* v. *Blatchford,* 307 F. Supp. 1038 (D.R.I. 1969) (preinduction review, in part, directed at the failure to advise the registrant and permit rebuttal of certain adverse information in his file); and *Bengoechea* v. *Micheli,* 295 F. Supp. 257 (D.P.R. 1969) (same). To our knowledge none of these cases has been appealed by the Government, which in effect is recognition of the validity of those rulings.

More recently in *Kendall* v. *Selective Service,* —— F. Supp. —— (N.D. Cal. 1971) (Case No. C-17 499 ACW), —— SSLR —— it was held that the failure of a local board to give reasons for revoking a registrant's conscientious objector status upon a petition for reconsideration by the State Director raised a procedural due process claim that meets the "degree of 'lawlessness' which *Oestereich* and other cases require for preinduction review." Such a claim, in the court's view, could be resolved expeditiously (as it actually was) because the court "need reexamine no finding of fact by the board, and need weigh

no evidence." See also *Haggerty* v. *Selective Service*, 325 F. Supp. 69, 72 (W.D. Pa. 1971).

Respondents make no relevant reply to these cases. Their argument is that, on the merits, petitioner has not *clearly* been denied procedural due process by the appeal board's summary revocation of his conscientious objector status. That argument is without foundation in light of the rudimentary nature of the procedural rights petitioner was denied. But, respondents' basic error is in their approach. It blinks reality to argue, as they have, that because a registrant has not proven beyond a reasonable doubt that each and every procedural violation he claims will be sustained he should not be permitted to invoke a court's jurisdiction to review. Certainly, petitioner's claims are presumptively valid especially in light of this Court's recent decisions in *Bell* v. *Burson*, 402 U.S. 535; *Goldberg* v. *Kelly*, 397 U.S. 254; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337; *Wisconsin* v. *Constantineau*, 400 U.S. 433, and the manifest concern of the Court that registrants, particularly those claiming conscientious objector status, should be afforded a fair and full opportunity to present their case to the appeal board. See *Mulloy* v. *United States*, 398 U.S. 410, 416; *Gonzales* v. *United States*, *supra*; *Simmons* v. *United States*, 348 U.S. 397.[14]

[14] Respondents misstate petitioner's procedural claims. Petitioner seeks to establish the right to notice of the issues by the appeal board. Therefore it does not matter that the State Director has stated no reasons for his appeal. Moreover, petitioner is entitled to a statement of reasons whether or not the appeal board believes that there is a *prima facie* case. Certainly, there can be no claim of undue burden for the board to state what simple facts, if any, in petitioner's application and file detract from his *prima facie* showing. Thus there is no need for a court to review any discretionary act by the board to determine a registrant's right to a statement of reasons.

Moreover, respondents do not (and after the 1971 Amendments can not) argue that affording petitioner the procedural safeguards he requests would disrupt the appeal process or would be inappropriate because of some overriding consideration.

III.

There is no substance to respondents' claim that this action is no longer ripe for adjudication because petitioner's cancelled induction order has not yet been reissued (Res. Br. p. 32). No contention is made that petitioner is no longer liable for induction. In fact, as a doctor, petitioner is specifically characterized as an extended liability registrant, and eligible for induction until the age of 35. Nor do respondents indicate any change on the part of the appeal board in terms of its view that petitioner is not qualified for conscientious objector status. As things stand petitioner has been classified I-A on the basis of the appeal board's decision, which he claims was unfairly made; he is thereby subject to an order of induction at any time respondents in their sole and exclusive discretion may decide to issue it.

The ripeness doctrine is designed to prevent courts

> "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court con-

sideration." *Abbot Laboratories, Inc.* v. *Gardner,* 387 U.S. 136, 148-149.

Clearly, the facts of this case demonstrate that the parties to this dispute stand in adverse position to one another, that the legal dispute is unavoidable and concretely presented, and that the injury petitioner seeks to avoid is of such a grave nature that the absence of any barriers to its imposition has a substantial impact on petitioner's daily activities and future plans. In no sense, then, can petitioner's claim of right be considered hypothetical or premature. See K. Davis, *Administrative Law Treatise,* §21.01 *et seq.* (1970 Supp.).

It should be noted that the petitioners in *Breen* v. *Selective Service, supra* and in *Anderson* v. *Hershey,* 397 U.S. 47 and *Osher* v. *Selective Service,* 397 U.S. 47, did not have outstanding induction notices at the time their cases were heard by the lower courts or by this Court. Moreover, in none of those cases, in contrast to this case, had the registrants received any prior induction order.

Based on the circumstances of this case, petitioner has every reason to believe that at the termination of this action, or perhaps even before, a new induction order will issue. It serves no valid purpose to dismiss this case now and compel petitioner to relitigate these issues under the time and emotional pressures created by a new induction order.

Finally, to understand the plight of a selective service registrant who will be living for years under the constant threat of respondents' acting upon his I-A classification by ordering him for induction—uprooting him from his civilian life, his family, and his professional work—is clearly to understand the ripeness of petitioner's case.

CONCLUSION

For the reasons stated above, the judgment below should be reversed with instructions to the Court of Appeals that it direct the District Court to enter an order restoring petitioner to his conscientious objector status pending compliance by the Selective Service Appeal Board with the requirements of procedural due process.

Respectfully submitted,

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Dated: October 7, 1971

Syllabus

FEIN v. SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7 OF YONKERS, NEW YORK, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 70–58. Argued October 12, 1971—Decided March 21, 1972

Following petitioner's classification as a conscientious objector by his local Selective Service Board, the State Director requested an appeal. Petitioner was notified but was not furnished with the basis for the appeal or given an opportunity to reply. The appeal board unanimously classified petitioner I–A and rejected his conscientious objector claim, without stating any reasons therefor. Petitioner was not entitled under the regulations to appeal to the national board, but the National Director, on petitioner's request, did note an appeal. The national board unanimously classified petitioner I–A, with no reasons given. There is no outstanding induction order for petitioner, who brought this pre-induction suit challenging, on due process grounds, the constitutionality of his Selective Service appeal procedures. The District Court dismissed the complaint, finding the suit barred by § 10 (b)(3) of the Military Selective Service Act of 1967, and the Court of Appeals affirmed. That section provides that a classification decision of the local board "shall be final, except where an appeal is authorized," and that the classification decision on appeal also "shall be final." It further provides that "[n]o judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction," and then the review "shall go to the question of the jurisdiction . . . only when there is no basis in fact for the classification." By statute enacted in September 1971, after petitioner's trial, a registrant is entitled to a personal appearance before a local or appeal board, and, on request, to a statement of reasons for any adverse decision. Ensuing changes in regulations, effective December 1971 and March 1972, provide the procedural features that petitioner complained were lacking. *Held:*

1. Section 10 (b)(3) forecloses pre-induction judicial review where the board has used its discretion and judgment in determining facts and arriving at a classification for the registrant. *Clark*

v. *Gabriel*, 393 U. S. 256, followed; *Oestereich* v. *Selective Service Board*, 393 U. S. 233, distinguished. In such case the registrant's judicial review is confined to situations where he asserts his defense in a criminal prosecution or where, after induction, he seeks a writ of habeas corpus. Pp. 372–377.

2. Petitioner's immediate induction is not assured, however, in light of the intervening statutory change, the new regulations thereunder, and a change in the Government's position, albeit in a post-induction case, to concede that some statement of reasons is necessary for "meaningful" review of the administrative decision when the registrant's claim has met the statutory criteria or has placed him prima facie within the statutory exemption. Pp. 377–381.

430 F. 2d 376, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN and WHITE, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 381. MARSHALL, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 387. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Michael B. Standard argued the cause for petitioner. With him on the briefs was *David Rosenberg*.

Solicitor General Griswold argued the cause for respondents. With him on the brief were *Assistant Attorney General Gray*, *Morton Hollander*, and *Robert E. Kopp*.

Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioner Oliver T. Fein is a doctor of medicine. In February 1969 he filed this pre-induction suit in the United States District Court for the Southern District of New York. Jurisdiction was asserted under the federal-question statute, 28 U. S. C. § 1331, under the civil rights statute, 28 U. S. C. § 1343, and under the federal-officer statute, 28 U. S. C. § 1361. Fein challenged, on

due process grounds, the constitutionality of his Selective Service appeal procedures, and sought declaratory and injunctive relief that would prevent his induction into military service. The defendants are Fein's local board at Yonkers, New York, the Appeal Board for the Southern District, the State Selective Service Director, and the National Appeal Board.

In an unreported memorandum decision the District Court dismissed the complaint for want of jurisdiction. A divided panel of the Second Circuit affirmed. 430 F. 2d 376 (1970). Certiorari was granted, 401 U. S. 953 (1971), so that this Court might consider the important question whether § 10 (b) (3) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 460 (b) (3),[1] permits this pre-induction challenge to Selective Service appeal procedures.

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[1] "The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], and the determination of the President shall be final. No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. . . ." 50 U. S. C. App. § 460 (b) (3).

Section 10 (b) (3) of the 1967 Act was amended by Pub. L. 92–129, § 101 (a) (26), 85 Stat. 351, approved Sept. 28, 1971. The amendment, however, did not change that portion of § 10 (b) (3) quoted above.

I

Fein, born May 5, 1940, registered with his Yonkers local board at age 18. He was assigned a II–S student deferment during his undergraduate years at Swarthmore College and, subsequently, during the period of his attendance at Case-Western Reserve University School of Medicine. Upon graduation from medical school, Fein was assigned a II–A occupational deferment because of his internship at Cleveland Metropolitan General Hospital.

In September 1967, while still an intern, Fein wrote his local board "to declare myself a conscientious objector to war and the institution which propagates war, the military." He requested and received SSS Form 150 for conscientious objectors. He promptly completed and returned the form to the local board.

In the form Fein stated: He believes in a Supreme Being. The beliefs from which his conscientious objection springs include the concepts that "human beings are primarily 'good,'" that this goodness "can only be realized, if human beings are allowed to fulfill their potential," and that "all human beings are fundamentally equal, in terms of their value as human beings." War violates "this essential being in all men . . . ." It "fosters irresponsibility for inhuman and cruel acts." It "demands a style of life, which is violent and hierarchical. It curbs and extinguishes rather than expands man's potential." The "substance of my beliefs stems from this common foundation of all religions. Thus my beliefs are not merely a personal moral code, but are ideals which emanate from centuries of religious tradition." He attributes the shaping of his beliefs to four principal sources: his parents, the church he formerly belonged to (a Lutheran body), the civil rights movement, and medicine. He believes "in the power

and values of moral and ethical force," but rejects "violent force" except perhaps in defense of self or of a loved one. His ideals were not articulated by age 18, but he began to formulate them at Swarthmore. Then followed a trip to the South; his break with his church; a summer in Germany where he learned of "biased American journalism about Cuba"; his helping organize a trip by students to Cuba; his interest in SNCC; his work in the slums of San Francisco; his settling in Cleveland's "Negro ghetto" during his first year at medical school; his then "full commitment to non-violence"; his contact with Students for a Democratic Society, which provided "a framework for working out my ideals about justice and equality"; and his "commitment to cooperative living and the poor community [which] stands as a mature expression of my beliefs."

Upon receiving Fein's Form 150 and letters supportive of his claim, the local board invited him to appear personally before it. He did so on November 15, 1967. After the interview the board denied him a I–O classification "at this time." Inasmuch as Fein then held his II–A classification, this action by the board was consistent with Selective Service Regulation 32 CFR § 1623.2 providing that a registrant be placed in the lowest class for which he is eligible.

In February 1968, however, Fein was reclassified I–A. He immediately asked for another personal appearance before the board. The request was granted and he appeared on May 27. The board then classified him as I–O and thus gave him his desired conscientious objector classification.

On June 4 the State Director, pursuant to 32 CFR § 1626.1, wrote the appeal board requesting an appeal and stating, "It is our opinion that the registrant would not qualify for a I–O classification as a conscientious objector." Notice of this was given Dr. Fein by mail.

Fein then wrote seeking "a statement indicating the basis for the State Director's appeal" and an opportunity to reply. No explanation was forthcoming.

The local board forwarded the file to the appeal board. Accompanying the file was a so-called "brief." This, as petitioner has conceded,[2] was merely a summary of the file prepared by a lay employee of the board. The appeal board, by a unanimous 4–0 vote on June 20, classified Dr. Fein I–A and thus rejected his claim to conscientious objector status. The board stated no reasons for its decision. Fein was notified of his reclassification.

Under 32 CFR § 1627.3[3] a registrant was not entitled to take an appeal to the presidential, or national, appeal board from an adverse classification by the state appeal board made by a unanimous vote. Fein was in this position. Accordingly, he wrote the National Director of Selective Service in July and asked that the Director appeal on his behalf under 32 CFR § 1627.1 (a). Fein's letter to the Director was detailed. It emphasized his above-stated beliefs and the way of life to which those beliefs had guided him. "It should be clear, that I am willing to serve my country, but only in activities consistent with my conscience." Fein outlined the administrative proceedings and listed five claimed inequities: (1) the appeal board's rejection, upon the appeal by the State Director, of the local board's classification; (2) the failure of the Director to state the basis for his challenge; (3) the absence of an opportunity to submit supplemental information before the file was forwarded; (4) the absence of an opportunity to rebut the State Director's decision to take an appeal; and (5) the absence of an opportunity for a personal appearance before the appeal board.

[2] Tr. of Oral Arg. 22.

[3] The provision is now 32 CFR § 1627.1 (b).

On July 31 Fein was ordered to report for induction September 6.

The National Director, however, complied with Fein's request and noted an appeal. Fein's outstanding induction order was canceled. He again asked the State Director for a statement of reasons. He was now advised that in the State Director's opinion he did not qualify for a Class I–O deferment and that the decision to appeal "was based upon the information contained in [his] selective service file."

On November 26, 1968, the national board, by a vote of 3–0, classified Dr. Fein I–A. No reason for this action was stated.

No new order that Fein report for induction has been issued.

Fein then instituted this suit. The complaint alleged that the statute and regulations governing Fein's classification and appeal violated the Due Process Clause of the Fifth Amendment in that they did not provide for a statement of reasons to the registrant for the State Director's decision to appeal, or for the appeal board's subsequent decision denying Fein a I–O classification. It also alleged that the defendants acted unconstitutionally by failing to provide Fein with the statements of reasons, by failing to permit him to submit additional material for consideration by the appeal boards, and by refusing him an opportunity to rebut the State Director's decision to appeal.

The District Court did not reach the merits of the constitutional claims. While expressing concern about Fein's ability to establish jurisdiction, the court assumed, *arguendo*, that he had done so, but then concluded that the suit was barred by § 10 (b)(3).

The Second Circuit affirmed, 430 F. 2d, at 377–380, relying, as did the District Court, upon *Oestereich* v. *Selective Service Board*, 393 U. S. 233 (1968); *Clark* v.

Gabriel, 393 U. S. 256 (1968); and *Boyd* v. *Clark*, 287 F. Supp. 561 (SDNY 1968), aff'd, 393 U. S. 316 (1969). One judge, in separate concurrence, 430 F. 2d, at 380, also thought that Fein had failed to establish the jurisdictional amount required under 28 U. S. C. § 1331. The third judge, citing the same cases as did the majority, dissented on the statutory issue; on the merits he would have ruled in Fein's favor. 430 F. 2d, at 380–388.

II

The case pivots, of course, upon the meaning and reach of § 10 (b)(3), and this Court's decisions in *Oestereich*, *Gabriel*, and *Boyd*, all *supra*, and in *Breen* v. *Selective Service Board*, 396 U. S. 460 (1970).

Section 10 (b)(3) states flatly that a classification decision of the local board "shall be final, except where an appeal is authorized . . ." and that the classification decision on appeal also "shall be final. . . ." It further provides, "No judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . . ." Even then, the review "shall go to the question of the jurisdiction . . . only when there is no basis in fact for the classification . . . ."

The finality language appeared in conscription statutes prior to the 1967 Act. See Selective Draft Act of May 18, 1917, § 4, 40 Stat. 80; Selective Training and Service Act of 1940, § 10 (a)(2), 54 Stat. 893; and Selective Service Act of 1948, § 10 (b)(3), 62 Stat. 619. The Court construed this finality language, however, as indicating a congressional intent to restrict only the scope of judicial review and not to deprive the registrant of all access to the courts. See, for example, *Estep* v. *United States*, 327 U. S. 114 (1946), and *McKart* v.

United States, 395 U. S. 185 (1969). But judicial relief was confined to the "no basis in fact" situation. *Estep, supra*, at 122–123; *McKart, supra*, at 196.

The "except" clause and the "no basis in fact" language came into § 10 (b)(3) with the 1967 statute by way of prompt congressional reaction provoked by the Second Circuit's decision in *Wolff* v. *Selective Service Local Bd.*, 372 F. 2d 817 (1967). See H. R. Rep. No. 267, 90th Cong., 1st Sess., 30–31; 113 Cong. Rec. 15426.[4]

Section 10 (b)(3), as so amended, was promptly challenged. In *Oestereich* the Court refrained from striking down the statute on constitutional grounds. It held, however, that pre-induction judicial review was available to that petitioner who, as a divinity student, claimed his local board had wrongfully denied him a statutory exemption from military service. To rule otherwise "is to construe the Act with unnecessary harshness." And, "No one, we believe, suggests that § 10 (b)(3) can sustain a literal reading." This construction, it was said, leaves the section "unimpaired in the normal operations of the Act." 393 U. S., at 238. See *Gutknecht* v. *United States*, 396 U. S. 295, 303 (1970), where reference was made to the "unusual circumstances" of *Oestereich*.

In the companion *Gabriel* case, on the other hand, the registrant was asserting a conscientious objector claim. The Court said:

> "Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a de-

[4] S. Rep. No. 209, 90th Cong., 1st Sess., 10, contained the observation that a registrant may also challenge his classification by post-induction habeas corpus. See *Witmer* v. *United States*, 348 U. S. 375, 377 (1955).

> termination of fact and an exercise of judgment. . . . To allow pre-induction judicial review of such determinations would be to permit precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower' (113 Cong. Rec. 15426 (report by Senator Russell on Conference Committee action)) which Congress sought to prevent when it enacted § 10 (b)(3)." 393 U. S., at 258–259.

The constitutionality of the statute again was upheld. *Id.*, at 259. MR. JUSTICE DOUGLAS, separately concurring, noted hypothetical fact situations as to which he might take a different view and then observed:

> "But in my view it takes the extreme case where the Board can be said to flout the law, as it did in *Oestereich* v. *Selective Service Bd.*, [393 U. S. 233], to warrant pre-induction review of its actions." 393 U. S., at 260.

Oestereich was complemented by *Breen* a year later with respect to a registrant statutorily entitled to a deferment rather than to an exemption. See also *Kolden* v. *Selective Service Board*, 397 U. S. 47 (1970).

Finally, pre-induction review was denied under § 10 (b)(3) in *Boyd* v. *Clark*, 287 F. Supp. 561 (SDNY 1968), a decision affirmed here, 393 U. S. 316 (1969), with only a single reference to *Gabriel*, decided just four weeks before. In *Boyd*, four registrants, each classified I–A, challenged student deferment on the ground that it discriminated against those financially unable to attend college. They did not otherwise contest their own I–A classifications.

Thus *Oestereich*, *Gabriel*, *Breen*, and *Boyd* together establish the principles (a) that § 10 (b)(3) does not foreclose pre-induction judicial review in that rather rare instance where administrative action, based on reasons unrelated to the merits of the claim to exemption or

deferment, deprives the registrant of the classification to which, otherwise and concededly, he is entitled by statute, and (b) that § 10 (b) (3) does foreclose pre-induction judicial review in the more common situation where the board, authoritatively, has used its discretion and judgment in determining facts and in arriving at a classification for the registrant. In the latter case the registrant's judicial review is confined—and constitutionally so—to the situations where he asserts his defense in a criminal prosecution or where, after induction, he seeks a writ of habeas corpus. By these cases the Court accommodated constitutional commands with the several provisions of the Military Selective Service Act and the expressed congressional intent to prevent litigious interruption of the Selective Service process.

III

These principles do not automatically decide Fein's case. The doctor, unlike Oestereich and unlike Breen, cannot and does not claim a statutory exemption or a statutory deferment on the basis of objectively established and conceded status. On the other hand, while *Gabriel* focuses on the administrative and discretionary process, it does not necessarily foreclose Fein's claim. This is so because Fein challenges the constitutionality of the very administrative procedures by which, he claims, the presentation of his case was adversely affected.

This was the aspect of the *Oestereich* and *Breen* decisions that concerned Mr. Justice Harlan. 393 U. S., at 239; 396 U. S., at 468–469. He would have allowed pre-induction judicial review of a procedural challenge on constitutional grounds if it presented no "opportunity for protracted delay" in the system's operations, and if the issue was beyond the competence of the board to hear and determine. This view, however, commanded the vote of no other member of the Court.

We again conclude that the line drawn by the Court between *Oestereich* and *Breen*, on the one hand, and *Gabriel* and, inferentially, *Boyd*, on the other, is the appropriate place at which, in the face of the bar of § 10 (b)(3), to distinguish between availability and unavailability of pre-induction review. We therefore adhere to the principles established by those cases.

We further conclude that, as measured against the facts of Fein's case, it is *Gabriel*, and not *Oestereich* and *Breen*, that is controlling. Unlike the registrants in *Oestereich* and *Breen*, Fein's claimed status is not one that was factually conceded and thus was assured by the statute upon objective criteria. His administrative classification action was, in contrast, a product of the "process" and the "system of classification," as the petitioner stressed at oral argument.[5] It turned "on the weight and credibility of the testimony," as MR. JUSTICE DOUGLAS noted in his concurrence in *Gabriel*, 393 U. S., at 259. And it was "dependent upon an act of judgment by the Board." *Gabriel*, 393 U. S., at 258.

The case strikes us, as did *Gabriel*, as representative of a category that, if allowed pre-induction review, would tend to promote the "litigious interruptions of procedures to provide necessary military manpower" that Congress intended to prevent. 113 Cong. Rec. 15426. The conscientious objector claim is one ideally fit for administrative determination.

We are not persuaded, as has been suggested,[6] that the local board's grant of the I–O classification equates with the conceded exemption and deferment involved in *Oestereich* and *Breen*. Objective certainty of status is lacking; in addition, the respective rulings of the two appeal boards were themselves based on an evaluation of the same file and yet were opposite to that of the

[5] Tr. of Oral Arg. 13, 18.

[6] Tr. of Oral Arg. 16–18.

local board. It is true that in *Oestereich* and *Breen* a result favorable to the registrant was also reversed, but there the change came about only by the board's consideration of extraneous circumstances apart from the merits of the underlying claims.

Finally, we find no merit in the petitioner's argument, apparently asserted for the first time in this Court, that a local board's determination, on a conscientious objector claim, favorable to the registrant is not amenable to the appeal procedures prescribed by the Act. Section 10 (b) (3), by its terms, makes a board's decision final subject to appeal and we see no confinement of that right of appeal to the registrant alone so as to nullify the regulations' express grant of appellate power to the State Director as well as to the registrant. The statute, furthermore, is specific as to the President's right to review.

The conclusion we have reached makes it unnecessary to consider in any detail the propositions, urged by the respondents, that the petitioner has not demonstrated the presence of the jurisdictional amount required under 28 U. S. C. § 1331, and that his arguments are premature because he is presently not the subject of an outstanding induction order.

IV

All this does not mean, however, that this decision assures Dr. Fein's immediate induction into military service. Events since the inception and trial of the case indicate otherwise:

A. *The 1971 Statute.* By Pub. L. 92–129, § 101 (a) (36), 85 Stat. 353, approved September 28, 1971, the following new section, 50 U. S. C. A. App. § 471a, was added to the 1967 Act, now renamed the Military Selective Service Act:

"Procedural Rights

"SEC. 22. (a) It is hereby declared to be the purpose of this section to guarantee to each regis-

trant asserting a claim before a local or appeal board, a fair hearing consistent with the informal and expeditious processing which is required by selective service cases.

"(b) Pursuant to such rules and regulations as the President may prescribe—

"(1) Each registrant shall be afforded the opportunity to appear in person before the local or any appeal board of the Selective Service System to testify and present evidence regarding his status.

. . . . . .

"(4) In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision."

A registrant thus is now statutorily entitled to a personal appearance before a local or appeal board and, on request, to a statement of reasons for any decision of the board adverse to him. This 1971 addition to the statute does not, by its terms, purport to be retroactive.

B. *The Emerging Regulations.* In implementation of the new statute, the administrative regulations have been undergoing change. Some amendments were promulgated effective December 10, 1971. 36 Fed. Reg. 23374–23385. Others were promulgated effective March 11, 1972. 37 Fed. Reg. 5120–5127. From these it appears that all, or nearly all, the procedural features about which Dr. Fein complains in the present case have been changed administratively. Specifically: (1) When an appeal is taken by the State Director "he shall place in the registrant's file a written statement of his reasons for taking such appeal." The local board shall notify the registrant in writing of the action and the reasons therefor, and advise him that the registrant may re-

quest a personal appearance before the appeal board. §§ 1626.3 (a) and (b). (2) At such personal appearance the registrant may present evidence, discuss his classification, point out the class or classes in which he thinks he should have been placed and may direct attention to any information in his file which he believes the local board has overlooked or to which it has given insufficient weight. He may present such further information as he believes will assist the board. The registrant, however, may not be represented before an appeal board by anyone acting as attorney and he shall not be entitled to present witnesses. §§ 1624.4 (c) and (d). (3) If the appeal board classifies the registrant in a class other than the one he requested, it shall record its reasons therefor in his file. The local board shall inform the registrant of such reasons in writing at the time it mails his notice of classification. § 1626.4 (i). (4) On the director's appeal to the national board the registrant may request an appearance. § 1627.3 (d). At that appearance the registrant may present evidence, other than witnesses, bearing on his classification. There, too, he may discuss his classification, point out the class or classes in which he thinks he should have been placed, and direct attention to any information in his file that he believes the local board overlooked or to which it has given insufficient weight. He may also present such further information as he believes will assist the national board in determining his proper classification. §§ 1627.4 (c) and (e). (5) If the national board classifies the registrant in a class other than the one he requested it shall record its reasons therefor in his file and on request by the registrant it shall furnish him a brief statement of the reasons for its decision. § 1627.4 (h).

Thus, under present procedure effective in part since December 10, 1971, and in part since March 11, 1972,

complaints about one's inability to appear before appeal boards, about not being given reasons for adverse classifications, and about inability to present additional material at the appellate stages are all alleviated and, indeed, eliminated.

C. *The Change in the Government's Position.* In their brief filed prior to the adoption of the 1971 Act, the respondents acknowledged the appearance of "a relatively recent line of authority" exemplified by *United States* v. *Haughton*, 413 F. 2d 736 (CA9 1969), to the effect that the failure of a local board to articulate in writing the reason for its denial of a conscientious objector classification is a fatal procedural flaw when the registrant has made a prima facie case for such status.[7] Brief 52–53. The rationale is that some statement of reasons is necessary for "meaningful" review[8] of the administrative decision when the registrant's claim has met the statutory criteria or has placed him prima facie within the statutory exemption, and his veracity is the principal issue.

The respondents appropriately noted, however, that these decisions were all so-called post-induction cases in the sense that they were appeals from convictions under § 12 (a), 50 U. S. C. App. § 462 (a). The respondents accordingly took the position that this line of authority, however appropriate it might be for post-induction review, did not support or justify an exception

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[7] See also *United States* v. *Edwards*, 450 F. 2d 49 (CA1 1971); *United States* v. *Lenhard*, 437 F. 2d 936 (CA2 1970); *Scott* v. *Commanding Officer*, 431 F. 2d 1132 (CA3 1970); *United States* v. *Broyles*, 423 F. 2d 1299 (CA4 1970); *United States* v. *Stetter*, 445 F. 2d 472 (CA5 1971); *United States* v. *Washington*, 392 F. 2d 37 (CA6 1968); *United States* v. *Lemmens*, 430 F. 2d 619 (CA7 1970); *United States* v. *Cummins*, 425 F. 2d 646 (CA8 1970); *United States* v. *Pacheco*, 433 F. 2d 914 (CA10 1970).

[8] See *Gonzales* v. *United States*, 348 U. S. 407, 415 (1955).

to the bar of § 10 (b)(3) against pre-induction review of the processing or classifying of registrants.

In a memorandum filed here since the 1971 Act in No. 70-251, *Joseph* v. *United States*, cert. granted, 404 U. S. 820 (1971), the Government has now taken the position that "[a]lthough this judicial rule [of *Haughton* and its progeny] finds little support in early precedent . . . we do not think it appropriate to contend that it is erroneous." The Government also notes that the requirement for an administrative statement of reasons "seems fully consistent with the new statutory . . . and regulatory . . . provisions on this point." Memo 13, 14.

While *Joseph* also is a conviction case and is not one on pre-induction review, its obvious significance for Fein is that if the doctor is ever again called for induction, the rule of *Haughton* will provide a defense for him unless and until the requirements of the new statute and regulations are fulfilled. Whether this necessitates a complete reprocessing of Fein's case is a matter we leave in the first instance to the administrative authorities.

The judgment of the Court of Appeals is therefore to be affirmed. We express no view upon the merits of Dr. Fein's conscientious objector claim other than to observe the obvious, namely, that his claim is not frivolous.

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

I

Today the Court approves a construction of § 10 (b)(3) of the Military Selective Service Act of 1967, 50

U. S. C. App. § 460 (b)(3),[1] which raises serious questions of procedural due process. Doctor Fein was classified as a conscientious objector by his local board. The State Director appealed, but gave no reason for this extraordinary action.[2] The Appeal Board then reclassified Dr. Fein I–A. It, too, gave no reasons.

We explained the nature of the "hearing" required by the Due Process Clause of the Fifth Amendment in *Morgan* v. *United States*, 304 U. S. 1, 18–19:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

See *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313. *Jenkins* v. *McKeithen*, 395 U. S. 411; *Greene*

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[1] Section 10 (b)(3) reads in pertinent part as follows:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

[2] Except the somewhat cryptic statement that "[i]t is our opinion that the registrant would not qualify for a I–O classification as a conscientious objector."

v. *McElroy*, 360 U. S. 474, 493; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 368–369.

Morgan involved property rights—rates for stockyard services. But the Due Process Clause protects "life" and "liberty" as well as "property." See *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596–598. If a man, contrary to his scruples, is forced to go overseas to battle, he is deprived of his "liberty," if not his "life."

When administrative orders deprive a person of property without a full and fair opportunity to object, this Court has been most reluctant to defer judicial review until after those orders have taken effect. See *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152–153; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463; *Londoner* v. *City & County of Denver*, 210 U. S. 373, 385. Judicial scrutiny has been particularly close where, as here, review is conditioned upon submitting to the risk of substantial penalties should the order prove to have been validly made. See *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Ex parte Young*, 209 U. S. 123. Cf. *Reisman* v. *Caplin*, 375 U. S. 440, 446–450. We should require no less when personal liberty is at stake.[3]

How can we possibly affirm the judgment below in light of the constitutional dimension of the problem? As respects his claim to "liberty," is Fein to be relegated to the procedures of a criminal prosecution when Congress was meticulous to provide for its resolution in the administrative process? No such downgrading of rights

[3] Some courts, however, have been more zealous in their exaltation of property rights than they have of constitutionally safeguarded individual liberties. See, *e. g.*, *Poole* v. *State*, 24[illegible] Ark. 1222, 1225, 428 S. W. 2d 628, 630:

"The right of an individual to acquire and possess and protect property is inherent and inalienable and declared higher than any constitutional sanction in Arkansas . . . ."

would be tolerated in a "property" case; why are we less mindful of the requirements of due process when a man's "liberty" is at stake?

II

Section 10 (b)(3) purports to defer judicial review of Selective Service System classification decisions to the defense of a criminal prosecution for failure to report for induction. It represents a congressional response to the concern that widespread and pre-induction review of Selective Service classification decisions would seriously impede the ability of the System to process manpower for the Armed Forces. See remarks of Senator Russell, 113 Cong. Rec. 15426. We held in *Oestereich* v. *Selective Service Board*, 393 U. S. 233, however, that the statute cannot be read literally. "For while it purports on its face to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent." *Id.*, at 238. We held that it must be interpreted to permit pre-induction review in that exceptional class of cases involving "a clear departure by the Board from its statutory mandate." 393 U. S., at 238. Because Ostereich's local board had employed unauthorized and "lawless" procedures to deprive him of an exemption to which he was entitled by statute, we further held that § 10 (b)(3) was no bar to the suit. See also *Breen* v. *Selective Service Board*, 396 U. S. 460.

The courts below, relying on *Clark* v. *Gabriel*, 393 U. S. 256, held that, unlike the ministerial exemption (IV–D) at issue in *Oestereich* and the student deferment (II–S) in *Breen*, the conscientious objector exemption (I–O) is committed to the discretion of the board, and contemplates the complex evidentiary and factual determinations which § 10 (b)(3) primarily intended to insulate from pre-induction review. Were Fein com-

plaining that his appeal board had no basis in fact to discontinue his conscientious objector exemption, this distinction would be significant.

The fact that Fein was classified I–O by his local board (rather than IV–D or II–S) before being stripped of his exemption does not, however, distinguish his case from *Oestereich*. Indeed, it is *Clark* v. *Gabriel, supra,* on which the majority and lower court placed such heavy reliance for the opposite proposition, that demonstrates the applicability of *Oestereich* to the present situation.

Gabriel's conscientious objector claim had been rejected by his local board, after "evaluating evidence and . . . determining whether a claimed exemption is deserved." *Oestereich, supra,* at 238. His basic argument was that there was no basis in fact to deny him his exemption. As the Court said, however, there was

> "no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. *By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.'*" 393 U. S., at 258 (emphasis supplied).

But Fein's claim, unlike that of Gabriel, *has* been "sustained by the local board." Thus, by statute, it is mandatory that the exemption be awarded him—subject, of course, to subsequent action in accordance with lawful, authorized procedures. But this is the situation which obtained in *Oestereich*. The exemption at issue in that case could also have been removed in accord with lawful procedures. The crucial similarity is that both Oestereich and Fein have met the preliminary hurdle of demonstrating to the local board their statutory fitness for a given exemption.

The nature of Dr. Fein's claim is that the Selective Service System has been "blatantly lawless," not in taking away his exemption, *per se*, but in doing so in a manner which violates the mandate of § 1 (c) of the Act, 50 U. S. C. App. § 451 (c), that the system be administered in a way "which is fair and just . . . ."

It should by now be undisputed that an essential of a "fair and just" procedure is the registrant's right to be heard by the agency in the system that deprives him of his liberty.[4] To be meaningful, that hearing must include the right to appear, and to be apprised of and given a chance to reply to adverse information contained in one's file. Dr. Fein was afforded none of these rights. The regulations did not permit a personal appearance before the appeal board. Dr. Fein was not informed of the reasons for the appeal. He had no right to submit a statement of his own, as the State Director, the person appealing, had not submitted a statement. 32 CFR § 1626.12. Dr. Fein never even received a statement of reasons for the appeal board's reclassification, a defalcation which the Solicitor General has conceded to be error in a similar context. Memorandum for the United States, *Joseph* v. *United States*, No. 70–251. See also Memorandum for the United States, *Lenhard* v. *United States*, No. 71–5840.

Like Oestereich's, therefore, Fein's complaint is "unrelated to the merits of granting or continuing that exemption," 393 U. S., at 237. It is instead a challenge to the

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[4] See, *e. g.*, *Clay* v. *United States*, 403 U. S. 698; *Mulloy* v. *United States*, 398 U. S. 410, 416; *Gonzales* v. *United States*, 348 U. S. 407, 417; *Simmons* v. *United States*, 348 U. S. 397, 405. See also *Greene* v. *McElroy*, 360 U. S. 474, 493; *Morgan* v. *United States*, 304 U. S. 1, 18–19; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 368–369; *United States* v. *Thompson*, 431 F. 2d 1265, 1271; *United States* v. *Cabbage*, 430 F. 2d 1037, 1039–1041; *United States* v. *Cummins*, 425 F. 2d 646; *United States* v. *Owen*, 415 F. 2d 383, 388–389; *Wiener* v. *Local Bd. No. 4*, 302 F. Supp. 266, 270.

basic fairness of the administrative process itself. And, while Fein himself characterizes his attack as a "constitutional" one, the procedural guarantees which he says were denied him are implicit in the Act itself. It is as unlawful to employ the regulations governing the appeal procedure to deny fundamental procedural rights implicit in the statutory scheme as it was in *Oestereich* and *Breen* to use the regulations governing delinquency to work a similar deprivation.

The literalness with which the Court treats Dr. Fein's claim "does violence to the clear mandate of" § 1 (c) of the Act, and misconstrues the thrust of *Oestereich*, *Gabriel*, and *Breen*. Fein's claim presents a clear case for pre-induction review. As in *Oestereich*, we have here a case where the Selective Service System is itself "basically lawless." On the admittedly extraordinary facts of this case, Fein has been effectively deprived of the entire panoply of appellate remedies guaranteed to him by the Act, and put in a position wherein meaningful judicial review of the underlying classification decision has become a virtual impossibility.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, dissenting.

I dissent. Today's holding reinterprets *Oestereich* v. *Selective Service Board*, 393 U. S. 233 (1968), to establish a principle that serves no sensible purpose. If *Oestereich* is to be preserved, it must be rooted in a principle that permits pre-induction review in this case as well.

As the majority correctly observes, our decision in *Oestereich* foreclosed any further argument that § 10 (b) (3) constitutes an absolute bar to pre-induction judicial review. "No one, we believe, suggests that § 10 (b) (3) can sustain a literal reading." *Id.*, at 238. Having thus adopted in *Oestereich*, and reaffirmed in

Breen v. *Selective Service Board*, 396 U. S. 460 (1970), an interpretation of the Act that permits pre-induction review in some cases, we need decide today only whether Dr. Fein raises that sort of exceptional claim appropriate for pre-induction review.

The majority apparently holds that pre-induction review is available only where a registrant's "claimed status is . . . factually conceded and thus [is] assured by the statute upon objective criteria." *Ante*, at 376. I confess that I do not altogether understand these key words in the majority's test. But I fathom enough to conclude that the test makes little sense. Although petitioner challenges only the procedures used by the Selective Service System, and does not ask this Court to decide the merits of his conscientious objector (CO) claim, he loses his lawsuit because his entitlement to a CO classification is not "factually conceded" or "objectively certain." But the merits of petitioner's CO claim are not at issue in this pre-induction litigation. I can think of no reasons for an approach that ignores the actual pre-induction claim, and that permits pre-induction review only where "objective certainty of [the registrant's] status" exists. *Ibid.* *Oestereich* should not be recast this narrowly.

The majority says that there can be pre-induction review only when the registrant's status is assured "upon objective criteria." This, by itself, might only mean that where status turns on unconceded factual claims—as opposed to more "objectively" determined legal claims—pre-induction review is barred. But the heart of the majority's test is that pre-induction review is permitted only when there is "objective *certainty*" of status. Obviously, this approach is not immediately suggested by the words of § 10 (b)(3), which proscribes pre-induction review "of the classification or processing of any registrant." Nor does it avoid the "unnecessary

harshness" that the majority concedes *Oestereich* sought to prevent. Where the registrant's status is "objectively certain," or where the Government concedes that it will not prosecute the registrant if he refuses induction and will confess error if he submits to induction and brings a habeas corpus action, the registrant is "least jeopardized by the procedural limitations of § 10 (b)(3)." *Oestereich* v. *Selective Service Board*, 393 U. S., at 251 (STEWART, J., dissenting). Where there is no pre-induction review, the harsher burden falls on the registrant whose rights and ultimate status are not free from doubt or conceded. He is the one faced with the enormous uncertainties of a criminal prosecution for refusing induction; and should he submit to what he thinks is an illegal induction, anticipating relief through habeas corpus, his uncertain prospects make it unlikely that he could avoid the massive dislocations of induction itself (*e. g.*, giving up a job, leaving school). In short, the majority's theory of pre-induction review helps the wrong people.[1]

A viable approach to the problem of pre-induction review is to be found by comparing *Oestereich* with the other § 10 (b)(3) case decided on the same day, *Clark* v. *Gabriel*, 393 U. S. 256 (1968). In *Clark* v. *Gabriel*, we interpreted § 10 (b)(3) to bar pre-induction review where the challenged action "inescapably involves a de-

[1] The cases in which the majority would permit pre-induction review are not those in which Selective Service manpower gathering processes are "interrupted" to a distinctively minimal extent. "Litigious interruption" comes from the ordinary processes of any litigation, the delays built in the Federal Rules. These interruptive time delays are not significantly shortened in lawsuits where the Government makes crucial concessions at the appeal stage (as in *Oestereich*), or where the pertinent determination is whether a registrant's status is "objectively certain." A day or two of court time may be saved, but, given the duration of the entire litigation, this is insignificant.

termination of fact and an exercise of judgment"; thus, we refused to allow pre-induction review where the registrant claimed, on the facts, that he was entitled to a CO classification. However, we permitted pre-induction review in *Oestereich, supra*, where the local board's action, taken pursuant to a purportedly valid disciplinary regulation, was in claimed conflict with rights to exemption assured by statute. Cf. *Breen* v. *Selective Service Board, supra*.[2] For reasons that will become clearer below, the crucial difference for me between the cases is that in *Oestereich* (and *Breen*) the registrant challenged a purportedly valid Selective Service rule of general application, the validity of which the administrative process could not competently adjudicate before induction.

At issue in Dr. Fein's case are Selective Service appeal procedures, general rules that are said to be invalid under the Constitution. At stake is not a Board determination "processing or classifying" an individual registrant,[3] but general procedures prescribing the way such determinations are made. The situation here is substantially similar to *Oestereich*, and altogether different from the one in *Clark* v. *Gabriel*. In *Oestereich*, as former Chief Judge Lumbard noted in dissent below,

> "the registrant challenge[d] a procedure unauthorized by statute, while claiming that the regulation

[2] The majority relies on *Boyd* v. *Clark*, 287 F. Supp. 561 (SDNY 1968), which we summarily affirmed, 393 U. S. 316 (1969), with a single citation of *Clark* v. *Gabriel*, 393 U. S. 256 (1968). Although the District Court dismissed the lawsuit on two grounds—that pre-induction review was improper and that the jurisdictional amount requirement had not been met—we affirmed on the single ground that pre-induction review was improper, as our simple reference to *Clark* v. *Gabriel* was designed to indicate. That reference should not be overburdened with significance. Since those registrants, who had *never* received an induction notice, had not reached a position of finality within the system, pre-induction review was inappropriate.

[3] Section 10 (b) (3) proscribes pre-induction review "of the classification or processing of any registrant . . . ."

> deprive[d] him of a right based on higher authority. The difference, which I do not deem significant, is that in *Oestereich* the conflict posed was between a [Selective Service] regulation—the delinquency provision—and a statutory command, the ministerial exemption." 430 F. 2d 376, 382 (1970).

Here, Selective Service appellate procedures, implemented under Selective Service regulations 32 CFR § 1626 *et seq.*, arguably conflict with the *constitutional* requirements of the Due Process Clause, "surely an a fortiori case for preinduction review." *Ibid.* In *Oestereich*, *Breen*, and this case, the Selective Service System relied on rules, purportedly valid, that are challenged as illegal in their general application.

In *Clark* v. *Gabriel*, the registrant challenged the factual and judgmental determination that he was not entitled to a conscientious objector classification. But Dr. Fein does not challenge that individualized judgment in his pre-induction suit. Here, the registrant's local board found him entitled to a CO classification, and then this presumptively correct classification was taken away pursuant to allegedly lawless and unconstitutional procedures.[4] The facial validity of these procedures is the only issue here. In neither *Oestereich*, *Breen*, nor this case would pre-induction inquiry look to discretionary determinations of the System, or to factual judgments of the local or appeal board. (Nor is there any dispute in

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[4] The majority notes:

"It is true that in *Oestereich* and *Breen* a result favorable to the registrant was also reversed, but there the change came about only by the board's consideration of extraneous circumstances apart from the merits of the underlying claims."

This distinction is indeed ironic. One of Fein's basic claims in this lawsuit is that absent a statement of reasons by the Appeal Board that took away his CO classification, there is no way of knowing whether that action was based on extraneous circumstances or whether it was lawful.

our case that the challenged procedures were actually followed here.)

In my view, pre-induction judicial review should be permitted where the registrant claims that generally applied rules administered by Selective Service are invalid, and where the administrative process is not competent to decide the registrant's claim. Unlike the approach of the majority, this approach would benefit an appropriate group of registrants, without doing violence to Congress' apparent purposes in passing § 10 (b) (3). While the majority opinion in *Oestereich* was directed narrowly to the facts there presented, the decision may fairly be said to recognize that § 10 (b)(3) was intended to be an integral part of the complex machinery designed by Congress to raise an army fairly and expeditiously. In my view, § 10 (b)(3) reflected two related assumptions of Congress. First, Congress assumed procedural regularity in the administrative system. Where the general administrative procedures are valid—where procedural regularity is acknowledged—individual "classification or processing" determinations may be presumed correct, and pre-induction review would be an unwarranted interference with an orderly induction system. More generally, as I view § 10 (b)(3), Congress wanted to make clear that since it had provided an elaborate administrative procedure in which registrants have a full opportunity to raise their claims, they should not be allowed to have duplicative judicial review of the administrative determinations before induction. These premises justifying a ban on pre-induction review may be undercut in particular cases, and in such cases pre-induction review should be permitted. Where, as in Dr. Fein's case, the underlying procedures of the classification system are themselves challenged—where Congress' presumption of procedural regularity is called into question—pre-induc-

tion review should be permitted. And where, as here, a registrant makes a claim not suited for administrative determination even in the first instance, pre-induction judicial review would not duplicate the administrative process and therefore should be permitted. Of course, where the correctness of a particular classification is at issue, the administrative process usually has an opportunity to decide whether the claimed error exists, and pre-induction review would be inappropriate. But a Selective Service Board of laymen does not have the competence to decide Dr. Fein's claim that generally applied Selective Service procedures are unconstitutional. Without pre-induction judicial review, Dr. Fein's liberty is taken without *any* competent body deciding the constitutional question he raises. Cf. *Oestereich* v. *Selective Service Board*, *supra*, at 243 (Harlan, J., concurring in result). Section 10(b)(3) does not require such a harsh result, at odds with the spirit, if not the letter, of so many of our constitutional decisions.

I would permit pre-induction review in this case, and would remand for consideration of the merits of petitioner's claims.